TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 195.

THE CALHOUN GOLD MINING COMPANY, PLAINTIFF IN ERROR,

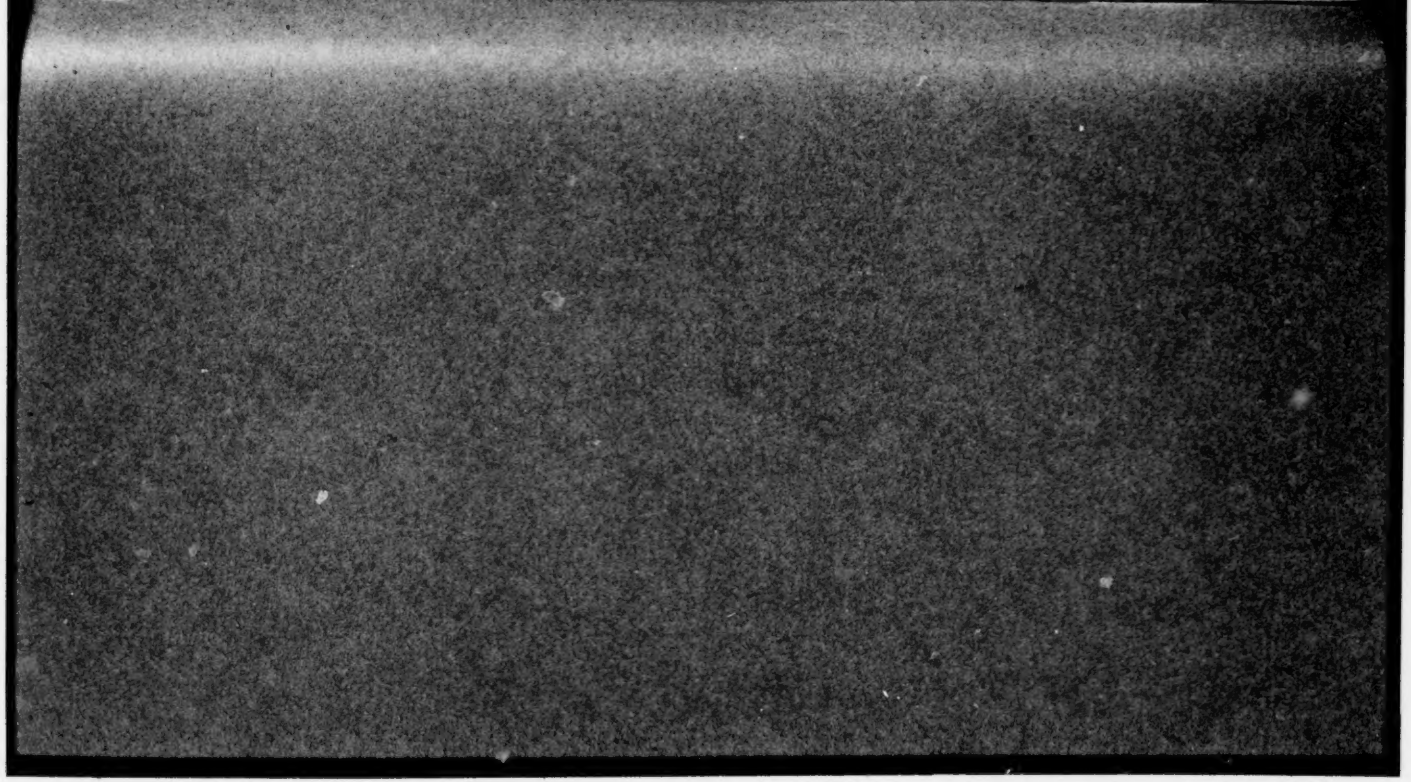
vs.

THE AJAX GOLD MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

FILED FEBRUARY 1, 1900.

(17,628.)



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1 In the Supreme Court of the State of Colorado.

THE CALHOUN GOLD MINING COMPANY, Appellant,
vs.
THE AJAX GOLD MINING COMPANY, Appellee.
No. 3954. Petition.

To the Honorable John Campbell, chief justice of said supreme court:

Comes now the above-named appellant, The Calhoun Gold Mining Company, petitioner, by its attorney, W. E. So Relle, and complains that in the record and proceedings, and also in the rendition of the judgment in said suit in the supreme court of the State of Colorado, being the court of last resort of the said State in which a decision could be had in said suit and in which a final judgment was rendered against your petitioner on the 20th day of November, A. D. 1899, and wherein your petitioner claims certain rights under the laws of the United States, and which said rights were denied your petitioner, all of which appears in the records and proceedings in said suit, manifest error hath happened, to the great damage of your petitioner, the said The Calhoun Gold Mining Company, and your petitioner respectfully shows unto your honor:

First. That the amount involved in this controversy, exclusive of costs and interest, exceeds the sum of two thousand ($2,000) dollars.

Second. That on the 18th day of March, A. D. 1897, the
2 Ajax Gold Mining Company, the above-named appellee, plaintiff below, commenced this action by filing its complaint in the district court of El Paso county, Colorado, and that thereafter and on, to wit, the 21st day of March, A. D. 1897, summons was served upon your petitioner, defendant below, The Calhoun Gold Mining Company, in Arapahoe county, Colorado; that thereafter and on, to wit, the 19th day of April, A. D. 1897, and before the defendant was required by the laws of the State of Colorado "to answer or plead to the declaration or complaint of the plaintiff," your petitioner filed its petition and bond for the removal of this cause into the circuit court of the United States for the district of Colorado, upon the ground that several Federal questions were involved and would be involved in the trial and determination of this cause; that thereafter and on, to wit, the 28th day of May, A. D. 1897, the said petition for the removal of this cause to the United States circuit court was denied, and thereupon your petitioner duly excepted.

Third. That in the assignment of errors filed with the transcript of record in said cause in the office of the clerk of the supreme court of Colorado your petitioner assigned as error the order of the lower court denying the said petition to remove the said cause to the said circuit court of the United States.

Fourth. That in the trial and determination of this cause in the *nisi prius* court and also in the said supreme court there *were* necessarily involved the construction of several sections of the Revised

Statutes of the United States, to wit, sections Nos. 2320, 2322, 2323, and 2336, as will more fully appear by reference to the record in this cause and also by reference to the decision of the said
3 supreme court, rendered on the said 20th day of November, A. D. 1899.

Fifth. That the Federal questions involved in this cause and the rights claimed by your petitioner and which have been denied by the said supreme court are as follows, to wit:

1. That your petitioner, as the owner of the Victor Consolidated Lode mining claim, under section 2336 of the Revised Statutes of the United States, claimed the right of possession of the vein of its said Victor Consolidated claim within the exterior boundaries of and across the Monarch, Mammoth Pearl, and Apex claims of appellee, save at the points of intersection of the veins, and that said right was denied your petitioner by the lower court and by the said supreme court.

2. That your petitioner, as the owner of the Ithaca Tunnel mining claim, located by your petitioner and its grantors under section 2323 of the Revised Statutes of the United States, claimed, under said section 2323, the right of way for said Ithaca tunnel through and across the Monarch, Mammoth Pearl, and Apex Lode mining claims of the appellee, and that said right was denied your petitioner by the said supreme court.

3. That your petitioner, as the owner of the said Ithaca Tunnel site and mining claim, under section 2323 of the Revised Statutes of the United States, claimed the right of possession of all veins or lodes within three thousand (3,000) feet from the face of said tunnel on the line thereof, not previously known to exist, discovered in such tunnel within the exterior boundaries of the said Monarch, Mammoth Pearl, and Apex Lode mining claim-, which last said locations were claimed by the appellee to be prior to the location
4 of said tunnel; that said right was denied your petitioner by the said supreme court.

4. That your petitioner in this cause in the court below, under section 2323, Revised Statutes of the United States, as owner of the said Ithaca tunnel, claimed the right to prove and offered to prove that there was no "discovery of the vein or lode within the limits of the claim located" by appellee, to wit, the Monarch and Mammoth Pearl claims, prior to the location and commencement of the said Ithaca tunnel by your petitioner and its grantors; that said right was denied your petitioner by both the *nisi prius* court and by the said supreme court.

Wherefore your petitioner, having prepared and filed herewith its assignment of errors, prays for the allowance of a writ of error removing this cause to the Supreme Court of the United States, and that you sign the citation and fix the amount of the bond to be given by your petitioner, and for such other process as may seem meet and proper unto your honor.

W. E. SO RELLE,
Attorney for Petitioner, The Calhoun Gold Mining Company.

STATE OF COLORADO, } ss:
County of Arapahoe, }

Ida M. Loftus, being first duly sworn, on oath states that she is the assistant secretary of The Calhoun Gold Mining Company, the above-named petitioner; that she has read the foregoing petition and knows the contents thereof, and that the same is true to the best of her knowledge and belief.

IDA M. LOFTUS.

Subscribed and sworn to before me this 29th day of December, A. D. 1899.

My commission expires Jan. 20, 1903.

[Seal of Paul W. Henrich, Notary Public, Arapahoe County, Colo.]

PAUL W. HENRICH,
Notary Public.

5 [Endorsed:] Supreme court of the State of Colorado. The Calhoun Gold Mining Co., appellant, *vs.* The Ajax Gold Mining Co., appellee. Petition. Petition granted, writ of error allowed, citation signed, and bond of plaintiff in error fixed at $1,000.00 on this 4th day of Jan., A. D. 1900. John Campbell, chief justice. Filed in supreme court Jan. 4, 1900. H. G. Clark, clerk.

6 In the Supreme Court of the State of Colorado.

THE CALHOUN GOLD MINING COMPANY, Appellant,
vs.
THE AJAX GOLD MINING COMPANY, Appellee. } Order.

To Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, Greeting:

In the above-entitled cause judgment was rendered against the above-named appellant, The Calhoun Gold Mining Company, on the 20th day of November, A. D. 1899, and in the hearing and determination of said cause there were involved several Federal questions, and certain rights under the statutes of the United States were claimed by the said appellant and denied by this court; and now, on this 4th day of January, A. D. 1900, the said The Calhoun Gold Mining Company, by its attorney, W. E. So Relle, has filed its petition, praying the allowance of a writ of error removing this cause to the Supreme Court of the United States for further proceedings, and having duly considered said petition, it is considered that a writ of error should be allowed. You are, therefore, commanded to prepare and forward a writ of error wherein the said The Calhoun Gold Mining Company is plaintiff in error and the said The Ajax Gold Mining Company is defendant in error, and forward the same to me with all due haste.

7 Witness the Honorable John Campbell, chief justice of the supreme court of the State of Colorado, on this the fourth day of January, A. D. 1900, and of the Independence of the United

States the one hundred and twenty-fourth, at Denver, in the State of Colorado.

JOHN CAMPBELL,
Chief Justice of the Supreme Court of the State of Colorado.

8 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Colorado, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Calhoun Gold Mining Company, appellant, and The Ajax Gold Mining Company, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or any authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Calhoun Gold Mining Company, as by its complaint appears, we, be-
9 ing willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty (30) days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 4th day of January, in the year of our Lord one thousand nine hundred.

Seal United States Circuit Court, District of Colorado.

ROBERT BAILEY,
Clerk of the Circuit Court of the United States for the District of Colorado,
By CHARLES W. BISHOP,
Deputy Clerk.

Allowed by—
JOHN CAMPBELL,
Chief Justice of the Supreme Court of the State of Colorado.

10 *Return.*

UNITED STATES OF AMERICA, }
District of Colorado, State of Colorado, } *ss:*

In obedience to the command of the above and foregoing writ, I herewith transmit to the honorable the Supreme Court of the United States a duly certified transcript of the record and proceedings in the above-entitled cause, together with all things concerning the same.

Witness my hand and the seal of the supreme court of the State of Colorado, at Denver, in said State, this 27th day of January, A. D. 1900.

Seal Supreme Court, State of Colorado.

HORACE G. CLARK,
Clerk of the Supreme Court of the State of Colorado,
By —— ——, *Deputy Clerk.*

11 [Endorsed:] Filed in supreme court Jan. 4, 1900. H. G. Clark, clerk.

12 UNITED STATES OF AMERICA, *ss:*

To the Ajax Gold Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Colorado, wherein The Calhoun Gold Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John Campbell, chief justice of the supreme court of the State of Colorado, this 4th day of January, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the 124th year, at Denver, in the State of Colorado.

JOHN CAMPBELL,
Chief Justice of the Supreme Court of the State of Colorado.

A copy of the foregoing citation was delivered to me on the 5th day of January, A. D. 1900, and I hereby accept service thereof on behalf of the said defendant in error, The Ajax Gold Mining Company.

JOSEPH C. HELM,
Attorney for said Def. in Error.

13 [Endorsed:] Filed in supreme court Jan. 4, 1900. H. G. Clark, clerk.

14 In the Supreme Court of the United States.

THE CALHOUN GOLD MINING COMPANY, Plaintiff in Error, *vs.* THE AJAX GOLD MINING COMPANY, Defendant in Error.	Error to the Supreme Court of the State of Colorado.

Assignment of Errors.

Comes now the said The Calhoun Gold Mining Company, plaintiff in error, by its attorney, W. E. So Relle, and says that the judgment of the supreme court of the State of Colorado in case No. 3954, wherein the said The Calhoun Gold Mining Company was appellant and the said The Ajax Gold Mining Company was appellee, should be reversed and be entered in favor of the plaintiff in error, and that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. The court erred in deciding that plaintiff in error is not entitled to the right of possession of the vein of its Victor Consolidated Lode mining claim through and across the Monarch, Mammoth Pearl, and Apex Lode mining claims under section 2336 of the Revised Statutes of the United States.

Second. The court erred in denying to the plaintiff in error the right of way for its Ithaca tunnel, located under section 2323 of the Revised Statutes of the United States, through and across the Monarch, Mammoth Pearl, and Apex claims of defendant in error.

Third. The court erred in denying to the plaintiff in error, as the owner of the Ithaca Tunnel site and mining claim, located under and by virtue of section 2323 of the Revised Statutes of the United States, the right of possession of all veins or lodes within
15 three thousand (3,000) feet from the face of said tunnel on the line thereof, not previously known to exist, discovered in such tunnel, within the exterior boundaries of the said Monarch, Mammoth Pearl, and Apex Lode mining claims.

Fourth. The court erred in denying to the plaintiff in error, as the owner of the Ithaca Tunnel site and mining claim, located under section 2323 of the Revised Statutes of the United States, the right to prove that there was no discovery of any vein or lode within the limits of the claim located by appellee, to wit, the Monarch and Mammoth Pearl claims, prior to the location and commencement of the said Ithaca tunnel by the plaintiff in error and its grantors.

Fifth. The judgment of the court is for the defendant in error and against the plaintiff in error.

Sixth. That by the record it appears that the judgment was given for the defendant in error and against the plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said The Calhoun Gold Mining Company and against the said The Ajax Gold Mining Company, and the said The Calhoun Gold Mining Company, by its attorney, W. E. So Relle, prays that the judgment aforesaid may be reversed and that judgment be entered for plaintiff in error, or that the cause be remanded to the said the supreme court of the State of Colorado for further proceedings therein, and for the costs in this behalf paid, laid out, and expended.

W. E. SO RELLE,
Attorney for Plaintiff in Error.

16 [Endorsed:] Supreme Court of the United States of America. The Calhoun Gold Mining Co., plaintiff in error, *vs.* The Ajax Gold Mining Co., defendant in error. Assignment of errors. Filed in supreme court Jan. 4, 1900. H. G. Clark, clerk.

17 *Bond on Appeal.*

THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents that we, The Calhoun Gold Mining Co. and The Fidelity and Deposit Co. of Md., a corporation doing business under the laws of the State of Colorado, are held and firmly bound unto The Ajax Gold Mining Company in the full and just sum of one thousand dollars, to be paid to the said The Ajax Gold Mining Company, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of January, in the year of our Lord one thousand nine hundred.

Whereas lately, at the September term, A. D. 1899, of the supreme court of Colorado, sitting at Denver, in a suit pending in said court between The Calhoun Gold Mining Company, appellant, and The Ajax Gold Mining Company, appellee, judgment was rendered against the said The Calhoun Gold Mining Company, and the said The Calhoun Gold Mining Company having prayed and been allowed a writ of error to the supreme court of the State of Colorado to reverse the judgment of the said supreme court, and a citation directed to the said The Ajax Gold Mining Company, citing and admonishing it to be and appear in the Supreme Court of the United States, at Washington, D. C., 30 days from and after the date of said citation:

Now, the condition of the above obligation is such that if
18 the said The Calhoun Gold Mining Company shall prosecute said appeal to effect and answer all damages and costs if it

fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

THE CALHOUN GOLD MINING COMPANY, [SEAL.]
By W. E. SO RELLE, *Vice-President.*

[Rev. stamp.]

Attest: IDA M. LOFTUS,
Ass't Secretary.

[SEAL.] THE FIDELITY AND DEPOSIT CO. OF MD.,
By GUY LE R. STEVICK, [SEAL.]
Member of Local Board.

Attest: HERBERT W. ROBINSON,
For WILLIAM G. MAITLAND,
General Agent.

Sealed and delivered in the presence of—
——— ———.
——— ———.

Approved:
JOHN CAMPBELL,
Chief Justice.

STATE OF COLORADO, }
County of Arapahoe, } ss:

Guy Le R. Stevick, a member of the local board of directors of the Fidelity and Deposit Company of Maryland, the surety in the foregoing bond, and Herbert W. Robinson, agent, of the firm of Chapman & Maitland, the duly authorized agents of the said The Fidelity & Deposit Company of Maryland, being duly sworn, depose and say that the said surety company is a corporation of the State of Maryland, carrying on the business of a surety company in the State of Colorado; that said surety company has fully complied with
19 all of the laws of the State of Colorado relating to surety companies doing business in this State, and particularly has complied with the requirements and provisions of the act concerning surety companies approved March 31st, 1897; that affiants are, respectively, the officers and agents of the said company, as hereinbefore stated, and that as such officers and agents they are duly authorized to execute the bond hereto annexed on behalf of the said company; that said surety company is authorized by its articles of incorporation and its by-laws to execute the bond hereto annexed, and that said company has assets consisting of capital stock paid up in cash and surplus over and above all of its liabilities exceeding the sum of four million ($4,000,000) dollars.

GUY LE R. STEVICK.
HERBERT W. ROBINSON.

Subscribed and sworn to before me this 4th day of Jan'y, A. D. 1900.

My commission expires February 18th, 1901.

MAUDE L. SELVEY,
Notary Public.

[SEAL.]

Endorsed: No. 3954. Supreme Court of the United States. The Calhoun Gold Mining Co., appellant, *vs.* The Ajax Gold Mining Co., appellee. Bond on appeal, $1,000.00. Filed and approved in supreme court Jan. 4, 1900. Horace G. Clark, clerk.

20 UNITED STATES OF AMERICA.

STATE OF COLORADO, } ss:
County of El Paso, }

Pleas before Honorable Horace G. Lunt, one of the judges of the district court of the fourth judicial district of the State of Colorado, sitting within and for El Paso county, in said State, in division two thereof, at a term begun and held at the court-house, in the city of Colorado Springs, in the county and State aforesaid, on the 11th day of January (it being the second Monday in January), A. D. 1897, and of the Independence of the United States the one hundred and twenty-first.

Present: Hon. Horace G. Lunt, judge aforesaid; Henry M. Blackmer, district attorney; W. S. Boynton, sheriff of said county; Edgar Howbert, clerk of said court.

Attest: EDGAR HOWBERT, *Clerk.*

Be it remembered that heretofore and on, to wit, the 18th day of March, A. D. 1897, there was filed in the office of the clerk of said court the complaint, which is in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
County of El Paso, }

In the District Court of the Fourth Judicial District, Sitting within and for said County.

21 THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant. } Complaint.

Now comes the plaintiff above named, The Ajax Gold Mining Company, and, complaining of the said defendant, The Calhoun Gold Mining Company, respectfully alleges and shows to this honorable court:

First. That it, the said The Ajax Gold Mining Company, and defendant, The Calhoun Gold Mining Company, are and at all times

hereinafter mentioned were corporations duly organized, existing, and carrying on business within the State of Colorado under and by virtue of the laws of said State in that behalf made and provided.

Second. That plaintiff is and for upwards of eighteen months last past has been the owner of the following-described lode claims or locations, to wit, the Monarch and the Mammoth Pearl, United States patent survey number 7913; the Apex, United States patent survey number 8178, and the Champion, United States patent survey number 9093, all of said lode mining claims being situate on Battle mountain, in Cripple Creek mining district, county of El Paso and State of Colorado, and being more particularly described by metes and bounds in the location certificates thereof, duly recorded in the office of the clerk and recorder of said county, and in the United States patents therefor heretofore issued by the United
22 States Government, and that during the said period of more than eighteen months last past plaintiff, as such owner, has been continuously in the possession of said premises, and has during all of that time been lawfully entitled to the exclusive, undisturbed, and peaceable possession and occupancy thereof.

Third. That on or about, to wit, the 1st day of May, A. D. 1896, defendant, without the knowledge or consent of plaintiff, wilfully and unlawfully broke and entered upon and into said premises under the south side line of the said Monarch claim, about 425 feet northerly from the southwest corner thereof, and at a great depth, to wit, about 100 feet below the surface, and between the said 1st day of May, A. D. 1896, and the beginning of this action wrongfully and unlawfully caused to be run and constructed therein an excavation, extending about north 20 degrees east, of great size, to wit, about 6 to 8 feet in height by about 4 to 6 feet in width and 900 feet in length, and dug, mined, removed, and converted to its own use large quantities of earth and mineral-bearing rock containing gold, silver, and other precious metals, the same being then and there the property of this plaintiff and of great value, to wit, $10,000.00, all to the damage and injury of plaintiff in large amount, to wit, the sum of $15,000.

Fourth. And plaintiff further alleges that defendant by means of an excavation under ground, beginning at a long distance from plaintiff's premises and connecting thereon below the surface with the said excavation aforesaid, is enabled to obtain access thereto and to re-enter said excavation upon plaintiff's premises without
23 the knowledge, let, or hindrance —, and is about to continue its unlawful invasion of plaintiff's premises and to further extend said excavation therein.

That in so wrongfully and unlawfully running and constructing said excavation upon said premises of plaintiff aforesaid defendant intersected and cut thereon numerous large veins and deposits of mineral-bearing earth, rock, and ores; that some of the veins and deposits so cut by defendant upon plaintiff's premises are rich and valuable, and by means of said underground excavation defendant can, without the knowledge of plaintiff, easily mine, extract, and re-

move the same, and that defendant is threatening to and is about to extract and remove such valuable ores and convert the same to its own use and benefit; that said premises of plaintiff derive their chief importance and value from said veins, lodes, and deposits of mineral ores, and the removal and conversion thereof by the defendant is a destruction *pro tanto* of plaintiff's property; that plaintiff has notified and commanded defendant to refrain from further trespassing upon plaintiff's premises and from extending said excavation further therein and from excavating or removing said ores therefrom; but that, disregarding said notices and wholly ignoring plaintiff's interests and rights, defendant threatens to and will, unless restrained by injunction from this honorable court, continue the removal and conversion of said ores and the perpetration of the other grave wrongs and injuries hereinbefore complained of, to the great and irreparable damage and injury of plaintiff, and that plaintiff has no plain, speedy, or adequate remedy at law whereby
24 it may protest its rights and avoid the destruction of its said property pending the trial and determination of this cause. Wherefore plaintiff prays:

1st. That summons issue from this honorable court commanding defendant to appear and answer fully unto the matters herein set forth.

2nd. That it have judgment against defendant for the damages already suffered, as aforesaid, in the sum of $15,000.

3rd. That pending the trial of this cause and the final determination thereof and the vindication of plaintiff's rights in the premises a temporary injunction issue from this honorable court restraining defendant, its officers, agents, and employees, from entering into the excavation above described upon plaintiff's premises, from further extending the same, and from extracting or removing any part or portion of the said mineral-bearing earth or rock aforesaid.

4th. That upon the final determination of this cause the said temporary injunction be made perpetual, forever forbidding defendant from the commission of the said wrongful acts and injuries to plaintiff.

5th. For the costs of this action and for such other and further relief as to this honorable court may seem meet and proper.

J. C. HELM AND
COLBURN & DUDLEY,
Attorneys for Plaintiff.

STATE OF COLORADO, } ss:
County of El Paso, }

Chas. H. Dudley, being duly sworn, on oath deposes and
25 says that he is — of the plaintiff above named, The Ajax Gold Mining Company; that he has read the foregoing complaint and knows the contents thereof, and that the facts stated in said complaint are true to the best knowledge and belief of affiant.

CHAS. H. DUDLEY.

Subscribed and sworn to before me this 18th day of March, 1897.
[SEAL.] EDGAR HOWBERT, *Clerk.*

Endorsed: No. 4870. District court, El Paso county. The Ajax Gold Mining Company, plaintiff, *v.* The Calhoun Gold Mining Company, defendant. Complaint. Filed in the district court of El Paso county, Colorado, Mar. 18, 1897. Edgar Howbert, clerk, by E. C. Davis, deputy.

And thereafter and on, to wit, the 27th day of March, A. D. 1897, the same being one of the days of the regular January, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction, etc.

26 At this day comes the said plaintiff, by its attorneys, and defendant, also by its attorneys, and, on motion of plaintiff, defendant desiring further time to prepare its defense—

It is ordered that upon the giving by said plaintiff of a good and sufficient bond, conditioned in the penal sum of one thousand dollars, and with surety or sureties to be approved by the clerk of this court, a temporary writ of injunction may issue as prayed in the complaint, except that either plaintiff or defendant may enter the excavation described therein for the purpose of examining and surveying the same and preparing proof for the hearing of the injunction application, this injunction to remain in force till such hearing or until the further order of the court.

HORACE G. LUNT, *Judge.*

3 27th, 1897.

And thereupon and on the same day the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction, etc.

At this day, in open court, comes the said plaintiff, by J. C. Helm and Colburn and Dudley, its attorneys, and on its motion—

It is ordered by the court that the hearing on injunction herein be continued until the 12th day of April, A. D. 1897.

27 And thereupon and on, to wit, the same day, there was issued by the clerk of said court the writ of injunction, which is in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
County of El Paso, }

In the District Court of El Paso County, State of Colorado.

THE AJAX GOLD MINING COMPANY, Plaintiff, }
vs. } Injunction.
THE CALHOUN GOLD MINING COMPANY, Defendant. }

The People of the State of Colorado to the Calhoun Gold Mining Company send greeting:

The above-named plaintiff having filed its complaint in our district court against the above-named defendant, praying for an injunction against said defendant, requiring it to refrain from certain acts in said complaint and hereinafter more particularly mentioned, on reading the said complaint in this action, duly verified on oath by Chas. H. Dudley, secretary of said plaintiff, and it satisfactorily appearing to the Honorable Horace G. Lunt, judge of said court, therefrom that it is a proper case for an injunction, and that sufficient ground- exist therefor, and the necessary and proper undertaking having been given, we therefore, in consideration thereof and of the particular matters in said complaint set forth, do strictly command you and each and every of you that, until the further order of
28 said court, you and each of you, your and each of your servants, agents, attorneys, employés, and all persons acting under the control, authority, or direction of you or either of you, do absolutely refrain from and desist from entering into the excavation described in plaintiff's complaint, from further extending the same, and from extracting or removing any part or portion of the said mineral-bearing earth or rock mentioned in said complaint as exposed in said excavation, excepting that each of the parties hereto may make such surveys and examinations of said excavation or workings for the hearings and trial in this cause as they may desire.

Witness Hon. H. G. Lunt, one of the judges of said court, and the seal thereof, at Colorado Springs, Colo., aforesaid, this 27th day of March, A. D. 1897.

EDGAR HOWBERT, *Clerk*,
[SEAL.] By M. L. TAYLOR, *Deputy*.

STATE OF COLORADO, } ss:
County of Arapahoe, }

I do hereby certify that I have duly executed the within writ on this 31st day of March, A. D. 1897, by serving the Calhoun Gold Mining Company, by delivering to and leaving with James Quinn, Jr., secretary of the above-named company, personally, with a true copy of the within writ of injunction, all in said county of Arapahoe, State of Colorado.

E. H. WEBB, *Sheriff*,
By W. H. LOAR, *Deputy*.

Endorsed: No. 4870. District court, El Paso county. The Ajax G. M. Co., plaintiff, *vs.* The Calhoun G. M. Co., defendant. Injunction. Sheriff's fees: Service, .30; mileage, .70; total, 1.00. Filed in the district court of El Paso county, Colorado, May 1, 1897.
29 Edgar Howbert, clerk, by E. C. Davis, deputy. Colburn & Dudley & J. C. Helm, attorneys for plaintiff.

And thereafter and on, to wit, the 12th day of April, A. D. 1897, the same being one of the days of the regular January, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction, etc.

At this day in open court comes the said plaintiff, by J. C. Helm and Colburn and Dudley, its attorneys, and, on its motion—

It is ordered by the court that the hearing on injunction be continued until the 17th day of April, A. D. 1897.

And thereafter and on, to wit, the 19th day of April, A. D. 1897, there was filed in the office of the clerk of the said court the petition for removal, which is in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
County of El Paso, }

In the District Court.

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Petition for Removal.

30 Your petitioner, The Calhoun Gold Mining Company, respectfully shows to this honorable court:

First. That it is the defendant in this suit, which is of a civil nature, and that the matter and value of the property in dispute in this cause exceeds the sum of two thousand dollars ($2,000.00), exclusive of interest and costs.

Second. That in the hearing and determination of this cause there will necessarily be involved several Federal questions and the construction of several of the statutes of the United States governing, providing for, and relating to the location and purchase of lode mining claims and tunnel sites.

Third. That among other controversies existing between plaintiff and defendant herein is one as to whether or not the acts done and performed by the defendant in its location of the tunnel site hereinafter described constitute it a valid, subsisting mining claim under the requirements of section number 2323 of the Revised Statutes of the United States.

Fourth. That upon the 19th day of August, A. D. 1895, this defendant and its grantors located the Ithica Tunnel site upon the unappropriated public mineral domain of the United States, and immediately thereafter and on, to wit, the 20th day of August, A. D. 1895, this defendant and its grantors marked the line of said tunnel with substantial posts and filed its location certificate in the office of the county clerk and recorder of El Paso county, Colorado; that the face of said tunnel and the line thereof, for a distance of several hundred feet from its face, at the time of said location, was upon
31 the unappropriated mineral domain of the United States, but that at a distance of about — feet from said face the said tunnel penetrated the side line of the said Monarch claim, and has been driven by this defendant entirely across the said Monarch claim and into the Mammoth Pearl claim described in the plaintiff's complaint; that the excavation described in plaintiff's complaint is the said tunnel; that said tunnel since its location has been driven with great diligence and continuously by this defendant, and that in the construction thereof several blind veins, which were not known to exist prior to the location of said tunnel site, have been discovered and exposed; that this defendant claims, while plaintiff denies, that each and every of said blind veins discovered in said tunnel, which were not known to exist prior to the location of said tunnel site, is the property of and owned by this defendant; that in determining this question a construction of section 2336 of the Revised Statutes of the United States will necessarily be involved.

Fifth. That a further question in the hearing and determination of this case will be involved, as follows, to wit: That defendant claims, while plaintiff denies, that the defendant has the right to drive said tunnel into and across the pretended claims of the plaintiff described in said complaint, and that in the determination of this question there will necessarily be involved a construction of section 2323 of the Revised Statutes of the United States.

32 Sixth. That in the hearing and determination of this cause the construction of section 2336 of the Revised Statutes of the United States must necessarily be involved for the following reason, to wit: That the defendant is the owner and in actual possession of that certain lode mining claim known as the Victor Consolidated, survey No. 8747, upon which a United States patent has been issued to the defendant; that said claim entirely crosses the Monarch and Mammoth Pearl Lode mining claims, described in the complaint and claimed by the plaintiff; that the patent of the Victor Consolidated claim is junior to the Monarch and Mammoth Pearl, and the conflicting surface is included in the last aforesaid patent; that the discovery vein of said Victor Consolidated claim is substantially parallel to the side lines and is continuous throughout the length of said Victor Consolidated claim, and crosses both end lines thereof, and is a cross-vein to the veins of the Monarch and Mammoth Pearl claims. By virtue of said section 2336 the defendant claims the right of possession and ownership of the vein of said Victor Consolidated claim within the side lines of the Monarch and Mammoth Pearl claims, save at the points of intersection of the veins, while plaintiff claims

every part and portion of said veins within the exterior boundaries of the Monarch and Mammoth Pearl claims; defendant constructed said tunnel and intersected the said vein of the Victor Consolidated claim within the exterior boundaries thereof at a point — feet from the face of said tunnel, at an expense of fifteen thousand dollars ($15,000.00), prior to any objection made by plaintiff. Defendant claims the right to work said claim and the vein thereof through said tunnel.

33 Seventh. That your petitioner desires to remove this suit before the trial or hearing thereof or before the hearing on an application for an injunction herein into the next circuit court of the United States to be held in the district of Colorado, and your petitioner offers herewith good and sufficient surety for its entering into said circuit court of the United States for the district of Colorado, on the first day of its next session, a copy of the records in this suit and for payment of all costs which may be awarded by the said circuit court of the United States if said court shall hold that this suit was wrongfully and improperly removed thereto.

And your petitioner therefore prays that the said surety and bond may be accepted; that this suit may be removed into the circuit court of the United States to be held in the district of Colorado pursuant to the statutes of the United States in such case made and provided, and that no further proceedings may be had herein in this court.

And he will ever pray.

W. E. SO RELLE,
Attorney for Petitioner.

STATE OF COLORADO, }
County of Arapahoe, } ss:

A. H. Weber, being duly sworn, on oath says that he is the vice-president of The Calhoun Gold Mining Company, the above-named petitioner; that the said The Calhoun Gold Mining Company is a corporation organized and existing under and by virtue of the laws of the State of Colorado, with its principal office at the city of

34 Denver, in said county and State; that affiant has read the foregoing petition and knows the contents thereof, and that the same is true except as to the matters and things therein stated on information and belief, and as to those he believes the same to be true.

A. H. WEBER.

Subscribed and sworn to before me this 23rd day of March, A. D. 1897.

My commission expires Dec. 26, 1897.

NELLIE PRESTON,
[SEAL.] *Notary Public.*

I, Wiley E. So Relle, as attorney and counselor at law of the several courts of record of the State of Colorado, do hereby certify that as counsel for the above-named petitioner I have examined the proceed-

ings against it and carefully inquired into the matters set forth in its petition, and I believe the same are true.

W. E. SO RELLE,
Attorney for Petitioner.

Endorsed: No. 4870. The Ajax Gold Mining Company, plaintiff, *vs.* The Calhoun Gold Mining Company, defendant. Petition for removal. Filed in the district court of El Paso county, Colorado, Apr. 19, 1897. Edgar Howbert, clerk, by E. C. Davis, deputy. Wiley E. So Relle, att'y for defendant, 511 Cooper bldg., Denver, Colo.

And thereafter and on, to wit, the 20th day of April, A. D. 1897, the same being one of the days of the regular January, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

35 THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction.

At this day comes the said defendant, by its attorney, Wiley E. So Relle, Esq., and the said defendant having heretofore presented and filed *his* petition for the removal of this cause to the circuit court of the United States for the district of Colorado, and having also on the same day filed its bond for such removal, and the court having considered the same—

It is ordered by the court that the said petition and bond be, and they are hereby, approved, and that this action be, and the same hereby is, removed to the said circuit court, and let the clerk of this court make a transcript of the papers in this behalf, together with all orders had and entered of record herein, and certify the same to said circuit court of the United States for the district of Colorado with all convenient speed upon the payment of all costs remaining due in this action.

And thereafter and on, to wit, the 4th day of May, A. D. 1897, the same being one of the days of the regular January, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
36 THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction.

At this day it is ordered by the court that the order of the 20th day of April, 1897, entered in this cause, removing the same to the United States circuit court, be, and the same hereby is, vacated and set aside, the same having been inadvertently entered.

Pleas before Honorable Ira Harris, one of the judges of the district court of the fourth judicial district of the State of Colorado, sitting within and for El Paso county, in said State, in division two thereof, at a term begun and held at the court-house, in the city of Colorado Springs, in the county and State aforesaid, on the 10th day of May (it being the second Monday in May), A. D. 1897, and of the Independence of the United States the one hundred and twenty-first.

Present: Hon. Ira Harris, judge aforesaid; Henry M. Blackmer, district attorney; W. S. Boynton, sheriff of said county; Edgar Howbert, clerk of said court.

Attest: EDGAR HOWBERT, *Clerk.*

Be it remembered that heretofore and on, to wit, the 17th day of May, A. D. 1897, the same being one of the days of the regular May, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

37 THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant.

At this day, in open court, comes the plaintiff, by its attorney, J. C. Helm, Esq.; and the defendant, by its attorney, W. E. So Relle, Esqr., also comes. Thereupon this cause *coming* on to be heard upon the petition of said defendant for the removal of this cause to the U. S. court, which is argued by counsel and submitted to the court and by the — taken under advisement.

And thereafter and on, to wit, the 28th day of May, A. D. 1897, the same being one of the days of the regular May, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction.

This cause having been heretofore submitted to the court upon the petition of defendant for the removal of this cause to the United States court, the court, being now sufficiently advised in the premises, doth deny said petition; to which ruling of the court the defendant duly excepted.

And thereafter and on, to wit, the 12th day of June, A. D. 1897, the same being one of the days of the regular May, A. D.
38 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant.

At this day, in open court, come the defendant, by its attorney, W. E. So Relle, Esq., and, upon his motion—

It is ordered by the court that the order heretofore made on the 28th day of May, 1897, be modified as follows: Time and until 15 days from (said 28th day of May, 1897) this day is allowed said defendant within which to plead or answer; and it is further ordered that time and until 10 days additional from said 28th day of May is allowed said defendant within which to plead or answer herein.

And thereafter and on, to wit, the 21st day of June, A. D. 1897, the same being one of the days of the regular May, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant.
} Injunction.

At this day, in open court, comes the plaintiff, by its attorneys, Colburn and Dudley, Esqrs., and, upon their motion and by consent, it is ordered by the court that the plaintiff's motion to
39 vacate the order entered on the 12th day of June, 1897, be, and the same hereby is, sustained, and that the defendant have leave to withdraw the demurrer by it filed herein, and time and until the 26th day of June, 1897, is allowed said defendant within which to answer the complaint herein, and time and until August 1st, 1897, is allowed said plaintiff within which to plead to said answer.

And thereafter and on, to wit, the 28th day of June, A. D. 1897, there was filed in the office of the clerk of said court the answer, which is in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
County of El Paso,

In the District Court of the 4th Judicial District, Sitting within and for said County.

THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} Answer.

Comes now the above-named defendant, The Calhoun Gold Mining Company, and for its answer in the above-entitled cause says:

First. Admits that plaintiff and defendant are corporations, as alleged in the complaint; admits that defendant caused the construc-

tion of the excavation described in plaintiff's complaint; admits that in constructing said excavation hereinafter called the Ithica tunnel it intersected and cut ten (10) large veins; admits
40 that United States patents for the surface ground described therein were issued to the plaintiff for the Monarch, Mammoth Pearl, Apex, and Champion lodes, mentioned in plaintiff's complaint. Defendant alleges that said patents were issued after the location of the Ithica tunnel hereinafter mentioned and before the discovery of any vein therein.

Second. Denies that plaintiff is entitled to the possession or occupancy of the said premises or any part or portion thereof; denies that said veins or any of them are the property of the plaintiff; denies that it constructed said excavation wrongfully or unlawfully; denies that it extracted, mined, removed, or converted any mineral-bearing rock containing gold or other valuable metals from any vein or veins belonging to the plaintiff; denies that plaintiff has been damaged in the sum of fifteen thousand ($15,000.00) dollars or in any other sum; denies that it has perpetrated any wrongs upon the plaintiff; denies that plaintiff has suffered or will suffer great or irreparable damage or any damage whatsoever by reason of the continuation of the said tunnel or the extraction of the ores from said veins; denies that plaintiff has no plain, speedy, or adequate remedy at law.

Third paragraph. Defendant alleges that at the time of the commencement and location of said Ithica tunnel there had never been discovered or exposed by the plaintiff, its grantors, or any other persons whatsoever, any vein, lode, ledge, deposit, or crevice bearing gold or other valuable minerals in rock in place in the discovery shaft or within the limits of either of said pretended Monarch, Mammoth Pearl, or Champion locations.

41 Fourth. Defendant alleges that on, to wit, the 19th day of August, A. D. 1895, the grantor of this defendant, A. H. Weber, who at that time was and ever since hath been a citizen of the United States, entered upon the unappropriated public mineral domain of the United States on Battle mountain, in the Cripple Creek mining district, El Paso county, Colorado, and located the Ithica Tunnel site or mining claim by posting a plain notice at the face of the said tunnel, which said notice comained the name of the locator, the date of location, and the general line or course of the said tunnel, specifying the place of commencement and the termination thereof, and that on the same date the said locator marked the line of the said tunnel upon the surface with substantial posts, one at the *the* place of commencement, one at the termination of the said tunnel, and one at each interval of one hundred (100) feet upon the said line; that on, to wit, the 20th day of August, A. D. 1895, the said locator filed in the office of the county clerk and recorder of said county a location certificate of the said tunnel mining claim, which said certificate contained the name of the locator or party interested therein, to wit, A. D. Weber; the date of location, to wit, the 19th day of August, A. D. 1895; the name of the claim, to wit, the Ithica Tunnel site; the number of feet claimed upon each vein discovered in said

tunnel, to wit, fifteen hundred (1,500); the place of commencement, termination, and the line of said tunnel as follows, to wit:

Beginning at the face of said tunnel, whence the S. ¼ cor. of sec. 29, T. 15 S., R. 69 W., bears S. 48 34′ E. 2,721.5, cor. No. 4, sur. No. 8747.

42 Victor Consolidated No. 2 lode bears S. 74 17′ E. 545.5 feet. Thence N. 10 W. 35 feet to a stake.

Thence N. 20 E. 2,965 feet to the north end of said tunnel; that said location certificate is found of record in the office of said county clerk in Book 212, on page 324.

Fifth. That the line of said tunnel runs diagonally across the said pretended lode mining claims mentioned in plaintiff's complaint, and crosses the side lines of each of said claims.

Sixth. That thereafter and on, to wit, the 20th day of August, A. D. 1895, the said locator granted and conveyed the said tunnel mining claim to this defendant, who then became, ever since hath been, and now is the owner thereof; that at all times since its incorporation the said defendant and each and every of its stockholders, *its stockholders* have been and now are citizens of the United States.

Seventh. That at all times after the said 20th day of August, A. D. 1895, and until restrained by order of this court, this defendant caused diligent and continuous work to be prosecuted in constructing a tunnel upon the line of the said Ithica Tunnel site, and that said tunnel is the excavation described in plaintiff's complaint; that it has reached a depth in the mountain of about fourteen hundred (1,400) feet from the face thereof, and that in the construction of the same the defendant has expended the sum of twenty thousand ($20,000) dollars; that at all times herein mentioned plaintiff knew that said tunnel was being constructed, and made no objection thereto until the same had reached a depth of about thirteen

43 hundred (1,300) feet and had cost this plaintiff fifteen thousand ($15,000.00) dollars; that said tunnel entered the south side line of the said Monarch Lode mining claim at a point about four hundred twenty-five (425) feet from the face thereof, and has been driven by said defendant entirely through and across the Monarch claim and into and almost across the said Mammoth Pearl, Apex, and Champion claims.

Eighth. That in the construction of the said tunnel defendant discovered therein the said ten (10) veins or lodes bearing gold and other valuable minerals in rock in place; that said lodes or veins and each of them are blind, do not appear upon the surface, and were not known to exist previous to the location of the said tunnel site; that no other veins or lodes were intersected in said tunnel; that upon the intersection and discovery of each of said lodes this defendant duly located the same in accordance with local customs, rules, and regulations of the miners in said mining district, the laws of the State of Colorado and of the United States.

(*a.*) That on the 19th day of September, A. D. 1895, said tunnel intersected the first of the said veins at a depth of one hundred thirty-eight (138) feet from the face of the said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted

at the face of said tunnel, where the same could be easily seen and examined, which said notice gives the said point of discovery, the name of the lode, to wit, the Ithica Tunnel No. 1 Lode mining claim; the date of discovery, to wit, the 19th day of September, A. D. 1895; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit, northwesterly and south-
44 easterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of the said lode, so that the same could be easily identified; that within ninety (90) days after the said date of discovery said defendant caused a duplicate copy of the said notice to be recorded in the office of the county clerk and recorder of El Paso county, Colorado.

(*b.*) That on the 27th day of September, A. D. 1895, said tunnel intersected a second vein at a depth of one hundred sixty-five (165) feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of the said tunnel, where the same could be easily seen and examined, which said notice gives the said point of discovery within the tunnel, the name of the lode, to wit, the Ithica Tunnel No. 2 Lode mining claim; the date of discovery, to wit, the 27th day of September, A. D. 1895; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit, northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of the said lode, so that the same could be easily identified; that within ninety (90) days after the said date of discovery said defendant caused a duplicate copy of the said notice to be recorded in the office of the county clerk and recorder of El Paso county, Colorado; that on the — day of ——, A. D. 1897, the defendant filed in the office of the said county clerk and recorder an additional and amended location certificate of the said lode.

45 (*c.*) That on the 20th day of December, A. D. 1895, the said tunnel intersected a third vein at a depth of three hundred fifty-six (356) feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of the said tunnel, where the same could be easily seen and examined, which said notice gives the said point of discovery, the name of the lode, to wit, the Ithica Tunnel No. 3 Lode mining claim; the date of discovery, to wit, the 20th day of December, A. D. 1895; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit, northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of said lode, so that the same could be easily identified; that within ninety (90) days after the said date of discovery said defendant caused a duplicate copy of the said notice to be recorded in the office of the county clerk and recorder of El Paso county, Colorado.

(*d.*) That on the — day of ——, A. D. 1896, said tunnel intersected the fourth vein at a depth of four hundred twenty-five (425) feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of said tunnel, where

the same could be easily seen and examined, which said notice gives the said point of discovery, the name of the lode, to wit, the Ithica Tunnel No. 4 Lode mining claim; the date of discovery, to wit, the — day of ——, A. D. 1896; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit,
46 northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of the said lode, so that the same could be easily identified; that thereafter and within — days from the said date of discovery said defendant caused a good and valid location certificate of the said lode to be filed in the office of the county clerk and recorder; which said certificate contained the same facts in said notice; that on the — day of ——, A. D. 1897, the defendant filed in the office of the said county clerk and recorder an additional and amended location certificate of said lode.

(*e.*) That on the 1st day of August, A. D. 1896, said tunnel intersected the fifth vein at a depth of five hundred eighty-one (581) feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of said tunnel, where the same could be easily seen and examined; which said notice gives the said point of discovery, the name of the lode, to wit, the Ithica Tunnel No. 5 Lode mining claim; the date of discovery, to wit, the 1st day of August, A. D. 1896; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit, northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of said lode, so that the same could be easily identified; that thereafter and within — days from the said date of discovery said defendant caused a good and valid location certificate of said lode to be filed in the office of the said county clerk and recorder; which said certificate contained the same facts contained in said notice.

47 (*f.*) That on the 16th day of August, A. D. 1896, said tunnel intersected the seventh vein at a depth of six hundred forty-three (643) feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of said tunnel, where the same could be easily seen and examined; which said notice gives the said point of discovery, the name of the lode, to wit, the Ithica Tunnel No. 6 Lode mining claim; the date of discovery, to wit, the 16th day of August, A. D. 1896; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit, northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of said lode, so that the same could be easily identified; that thereafter and within — days from the said date of discovery defendant caused a good and valid location certificate of said lode to be filed in the office of the said county clerk; which said certificate contained the same facts contained in the said notice.

(*g.*) That on the 22nd day of August, A. D. 1896, said tunnel intersected the seventh vein at a depth of six hundred eighty-one (681)

feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of said tunnel, where the same could be easily seen and examined; which said notice gives the said point of discovery, the name of the lode, to wit, the Ithica Tunnel No. 7 Lode mining claim; the date of discovery, to wit, the 22nd day of August, A. D. 1896; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course
48 of the vein, to wit, northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of said lode, so that the same could be easily identified; that thereafter and within — days from the said date of discovery said defendant caused a good and valid location certificate of said lode to be filed in the office of the said county clerk and recorder; which said certificate contained the same facts contained in said notice.

(*h.*) That on the 16th day of October, A. D. 1896, said tunnel intersected the eighth vein at a depth of nine hundred twenty-seven (927) feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of said tunnel, where the same could be easily seen and examined; which said notice contained the said point of discovery, the name of the lode, to wit, the Ithica Tunnel No. 8 Lode mining claim; the date of discovery, to wit, the 16th day of October, A. D. 1896; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit, northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty feet, and a description of said lode, so that the same could be easily identified; that thereafter and within 90 days from the said date of discovery said defendant caused a good and valid location certificate of said lode to be filed in the office of the said county clerk and recorder; which said certificate contained the same facts contained in said notice.

(*i.*) That on the 28th day of October, A. D. 1896, said tunnel intersected the ninth vein at a depth of nine hundred sixty-one
49 (961) feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of said tunnel, where the same could be easily seen and examined; which said notice gives the said point of discovery, the name of the lode, to wit, the Ithica Tunnel No. 9 Lode mining claim; the date of discovery, to wit, the 28th day of October, A. D. 1896; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit, northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of said lode, so that the same could be easily identified; that thereafter and within 90 days from the said date of discovery said defendant caused a good and valid location certificate of said lode to be filed in the office of the said county clerk and recorder; which said certificate contained the same facts contained in said notice.

(*j.*) That on the 5th day of January, A. D. 1897, said tunnel intersected the tenth vein at a depth of one thousand three hundred

seven (1,307) feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of said tunnel, where the same could be easily seen and examined; which said notice contained the name of the lode, to wit, the Ithica Tunnel No. 10 Lode mining claim; the date of discovery, to wit, the 5th day of January, A. D. 1897; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit, northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of said lode, so that the same could be easily identified; that thereafter and within 90 days from the said date of discovery said defendant caused a good and valid location certificate of said lode to be filed in the office of the said county clerk and recorder; which said certificate contained the same facts contained in said notice.

Ninth. Defendant alleges that during the year A. D. 1896 the defendant caused at least one hundred ($100.00) dollars' worth of work to be done for the development and improvement of each of said lodes; that from the point of the discovery of the said Ithica Tunnel No. 2 lode it has caused a drift upon the vein to be run northwesterly about one hundred (100) feet; that from said point of discovery upon the said Ithica Tunnel No. 9 lode it has run drifts and developed said vein for a distance of about one hundred (100) feet; that from the said last-mentioned lode said defendant has mined, extracted, and shipped ores of the value of $400 *dollars*, and defendant denies that it has mined, extracted, or shipped any other ores from said premises or any portion thereof. Defendant alleges, further, that as nearly as can be determined from present development the said lodes and each of them discovered in said tunnel extend across the said pretended claims described in plaintiff's complaint.

Tenth. Defendant alleges that at all times since the intersection of said veins in said tunnel it has been in the actual and continuous possession and occupation of the same; that the defendant is the owner of and is entitled to the possession of said veins and each of them, and defendant claims further, that said veins and each of them are excepted out of the said patents. Defendant claims the right of way through said tunnel for the purpose of mining, extracting, and shipping the ores from said veins, and defendant also claims the right to extend said tunnel upon the line thereof to the full extent of three thousand (3,000) feet from the face under the customs, rules, and regulations of miners in said mining district, the laws of the State of Colorado and of the United States.

For a second and separate answer to plaintiff's complaint, defendant says:

First. Admits that plaintiff and defendant are corporations, as alleged in the complaint; admits that defendant caused the construction of the excavation described in plaintiff's complaint; admits that in constructing said excavation, hereinafter called the Ithica tunnel, it intersected and cut numerous large veins; admits that United States patents for the surface ground described in the said

patents were issued to the plaintiff for the Monarch, Mammoth Pearl, Apex, and Champion lodes.

Second. Denies that plaintiff is entitled to the possession of the said premises or any part or portion thereof; denies that said veins or any of them are the property of the plaintiff; denies that it constructed said excavation wrongfully or unlawfully; denies that it extracted, mined, removed, or converted any of the ores contained in said veins, except as hereinafter expressly admitted; denies that plaintiff has been damaged in the sum of fifteen thousand
52 ($15,000.00) dollars or any other sum; denies that it has perpetrated any wrongs upon the plaintiff; denies that plaintiff has suffered or will suffer great or irreparable damage, or any damage whatsoever, by reason of the continuation of the said tunnel or the extraction of the ores from said veins; denies that plaintiff has no speedy or adequate remedy at law.

Third. Defendant alleges that it is the owner and in the actual occupation and possession of the Victor Consolidated Lode mining claim, U. S. patent survey No. 8747, situate on Battle mountain, in Cripple Creek mining district, El Paso county, Colorado, and upon which patent has heretofore been issued; that at the time of the location of said claim the grantors of this defendant had discovered and exposed in the discovery shaft thereof a strong, well-defined vein or lode bearing gold and other valuable metals in rock in place, and thereupon located the said Victor Consolidated claim, with its side lines as nearly parallel to the said vein as could be determined at that time from the developments; that the said vein is continuous throughout the entire length and crosses both end lines of the said Victor Consolidated claim; that the said Victor Consolidated claim and the vein of the Victor Consolidated claim extend entirely across the claims mentioned in plaintiff's complaint; that said Victor Consolidated vein of the Victor Consolidated claim is a cross-vein to the veins of the Monarch, Mammoth Pearl, Apex, and Champion claims mentioned in plaintiff's complaint; that the surface ground within the exterior boundaries of the Victor Consolidated claim, on each side of the claims mentioned in plaintiff's complaint, is included in the patent of the said Victor Consolidated
53 claim and is the property of this defendant. Defendant alleges that it is the owner and in the lawful possession and entitled to the possession of the said vein of the Victor Consolidated claim within the exterior boundaries of the claims mentioned in plaintiff's complaint, save at the points where the said Victor Consolidated vein intersects the veins of the said claims mentioned in plaintiff's complaint.

Fourth. Defendant alleges that on, to wit, the 19th day of Aug., A. D. 1895, the grantor of this defendant, A. H. Weber, who at that time was and ever since hath been a citizen of the United States, entered upon the unappropriated public mineral domain of the United States on Battle mountain, in the Cripple Creek mining district, El Paso county, Colorado, and located the Ithica Tunnel site; that at the point of commencement or face of said tunnel the said locator posted a plain notice, giving the name of the locator, the

date of location, and the general line of course of the said tunnel, specifying the place of commencement and the termination thereof, and that upon the same date said locator marked the line of said tunnel upon the surface with substantial posts, one at the place of commencement, one at the termination of the said tunnel, and one at each interval of one hundred (100) feet upon the line thereof; that on, to wit, the 20th day of August, A. D. 1895, said locator filed in the office of the county clerk and recorder of said county a location certificate of the said tunnel, giving the name of the locator or party interested therein, to wit, A. H. Weber; the date of location, to wit, the 19th day of August, A. D. 1895; the name of the claim, to wit, the Ithica Tunnel site or mining claim; the number of
54 feet claimed upon each vein discovered in said tunnel, to wit, fifteen hundred (1,500) feet; the place of commencement, termination, and the line of said tunnel as follows, to wit:

Beginning at the face of said tunnel, whence the S. ¼ cor. of sec. 29, T. 15 S., R. 69 W., bears S. 48 34′ E. 2,721.5, cor. No. 4, sur. No. 8747.

Victor Consolidated No. 2 lode bears S. 74 17′ E. 545.5 feet.

Thence N. 10 W. 35 feet to a stake.

Thence N. 20 E. 2,965 feet to the north end of said tunnel.

That said location certificate is found of record in the office of the said county clerk and recorder, in Book 212, on page 324; that the line of said tunnel entered the west side line of said Victor Consolidated claim at a point about eight hundred fifty (850) feet from the face of said tunnel and passes diagonally across said claim and crosses the east side line thereof at a point about fourteen hundred twenty-five feet (1,425) from the face thereof.

Fifth. That thereafter and on, to wit, the 20th day of August, A. D. 1895, the said locator granted and conveyed the said tunnel site to this defendant, who then became, ever since hath been, and now is the owner thereof; that at all times thereafter, until restrained by order of this court, this defendant has prosecuted work diligently and continuously in running the tunnel upon the line of said tunnel site for the development of the veins or lodes of the said Victor Consolidated claim and for the discovery of mines; that said tunnel is the excavation described in plaintiff's complaint; that it has
55 reached a depth in the mountain of about fourteen hundred (1,400) feet from the face thereof, and that in the construction thereof the defendant has expended the sum of twenty thousand ($20,000.00) dollars; that at all times herein mentioned plaintiff knew that said tunnel was being constructed and made no objection thereto until the same had reached a depth of thirteen hundred (1,300) feet from the face and had cost this plaintiff fifteen thousand ($15,000.00) dollars.

Sixth. That the said tunnel within the side lines of the Victor Consolidated claim intersects two (2) veins, the first at a depth of nine hundred twenty-seven (927) feet, and the second at a depth of nine hundred sixty-one (961) feet from the face thereof; that the said lodes or veins have the same general characteristics and bear evidences of uniting and becoming one and the same vein; that said

vein or veins bear the same general characteristics to the said vein discovered and exposed in the discovery shaft of the said Victor Consolidated claim, and defendant alleges that said veins or lodes are one and the same vein, and that it extends entirely across the claims mentioned in plaintiff's complaint and into and underneath the surface ground included in the said patent of the Victor Consolidated claim on each side of claims claimed by plaintiff.

Seventh. Defendant denies that it has extracted, mined, removed, or converted any mineral-bearing rock containing gold or other valuable metals from the said premises or any part or portion thereof save from the said vein intersected in said tunnel at nine
56 hundred sixty-one (961) feet from the face thereof; that upon said vein the said defendant has drifted for about one hundred (100) feet, and has mined and extracted ores of the value of $400 *dollars* and no more. Defendant alleges that it was diligently prosecuting work upon the vein or veins of the Victor Consolidated claim with a view of developing the same at the time the said restraining order was issued by this court, and defendant further alleges that it is desirous of continuing the development of the same throughout its length, and is desirous of working, mining, and extracting the ores from said vein through said tunnel; defendant alleges that it has been damaged in the sum of ten thousand ($10,000.00) dollars by reason of the restraining order heretofore issued in this cause.

Eighth. Defendant claims the right of way through said tunnel to work and mine the veins of the said Victor Consolidated claim under the local customs, rules, and regulations of the miners in said mining district, the laws of the State of Colorado and of the United States. The plaintiff watched the construction of said tunnel in silence, thinking that it would some day reap the harvest of defendant's energies. Now, that plaintiff has watched and waited and remained silent when conscience required it to speak, it should not be permitted to speak now that conscience requires it to be dumb.

Wherefore defendant prays:

1st. That the said restraining order heretofore issued in this cause be dissolved and held for naught.

2nd. For judgment against plaintiff for damages in the sum of ten thousand ($10,000.00) dollars.

57 3rd. For the costs of this action and for such other and further relief as to this honorable court may seem meet and proper.

W. E. SO RELLE,
Attorney for Defendant.

STATE OF COLORADO, } ss.:
County of Arapahoe, }

A. H. Weber, being duly sworn, deposes and says:

That he is the vice-president of the defendant above named, The Calhoun Gold Mining Company; that he has read the foregoing answer and knows the contents thereof, and that the facts stated in said answer are true to the best knowledge and belief of the affiant.

A. H. WEBER.

Subscribed and sworn to before me this 26th day of June, A. D. 1897.

My commission expires Dec. 26, 1897.

NELLIE PRESTON,
[SEAL.] *Notary Public.*

Endorsed: No. 4870. In the district court. The Ajax Gold Mining Company *vs.* The Calhoun Gold Mining Company. Answer. Filed in the district court of El Paso county, Colorado, Jun- 28, 1897. Edgar Howbert, clerk, by E. C. Davis, deputy. W. E. So Relle, attorney for defendant, 509–512 Cooper bldg., Denver, Colorado.

And thereafter and on, to wit, the 10th day of August, A. D. 1897, there was filed in the office of the clerk of said court the replication, which is in words and figures as follows, to wit:

58 STATE OF COLORADO, } ss:
County of El Paso, }

In the District Court.

THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} No. 4870. Replication.

I.

Now comes the plaintiff above named, and replying only to all that part or portion of the first pretended defense pleaded in defendant's answer heretofore filed herein, embraced in paragraphs "first" and "second" and "fourth" to "tenth," inclusive thereof—

Denies each and every allegation contained and set forth in said paragraphs numbered "first," "second," and "fourth" to "tenth," inclusive, of said first pretended defense, save and except such allegations as shall be hereinafter expressly admitted or expressly denied.

Admits that one A. H. Weber was on the 19th day of August, 1895, a citizen of the United States, and that on or about the 20th day of August, 1895, he filed with the clerk and recorder of said El Paso county an instrument denominated a location certificate, containing the name Ithica Tunnel site and the description in said defense stated, and that the same was recorded in Book 214, at page 324, of said records.

Admits that the Ithica tunnel, in said defense mentioned, is the excavation in plaintiff's complaint described.

59 Admits that the line of said tunnel runs diagonally across the said claims belonging to plaintiff for a distance of about 900 feet.

Admits that the said tunnel has reached a depth of about 1,365 feet from its face, but no more.

Admits that said tunnel enters the south side line of the Monarch

claim of plaintiff and has been driven entirely through said Monarch claim and into said Mammoth Pearl and Apex claims.

Admits the defendant in running said tunnel cut ten veins or lodes, bearing gold and other valuable minerals in rock in place, but denies that said veins are blind veins and do not appear upon the suface, and denies that they were not known to exist previous to the location of said tunnel site or claim.

Admits that certain instruments purporting to be duplicate copies of discovery notices or location certificates or amended location certificates referring to the lodes or veins so cut in defendant's tunnel were filed for record and recorded with the clerk and recorder of said El Paso county, but denies that the same were so filed within ninety days from the dates when defendant cut said veins in said tunnel respectively, and denies that one hundred ($100) dollars' worth of work or labor was done on or for the development of each of said veins or lodes during the year 1896, and denies that each or any of said veins was excepted out of plaintiff's patents.

60 Admits that defendant extracted and removed four hundred ($400) dollars' worth of ore from one of the veins cut in said tunnel, as in said defense averred, but denies that said four hundred ($400) dollars covers the value of all the ore mined and extracted by defendant from plaintiff's ground by means of said tunnel.

Denies that plaintiff at all times knew that said tunnel was being constructed, and alleges the fact to be that plaintiff did not know the progress thereof and had no notice or knowledge whatever that defendant had by means of said tunnel entered upon plaintiff's said premises and was extending the same therein until on or about the month of November, 1896, and that thereafter and on or about the 21st day of November, 1896, plaintiff caused a notice to be served upon defendant forbidding defendant to proceed further into plaintiff's premises with its said excavation and tunnel and commanding it to desist from removing any ores therefrom, and that thereafter and on or about the 21st day of January, 1897, plaintiff, being informed and believing that defendant had failed to obey said notice, caused to be served upon defendant a second notice of similar tenor and effect.

II.

Second. For a further and separate replication to said paragraphs "first," "second," "fourth" to "tenth," inclusive, of said first pretended defense in defendant's answer pleaded, plaintiff says:

That the patent from the United States conveying to the grantors of plaintiff title in fee-simple to said Apex vein and mining claim was issued long prior to the pretended location of said Ithica

61 Tunnel site and long prior to the commencement of the said Ithica tunnel, and on or about, to wit, April 22nd, 1895; that the United States patent conveying to the grantors of plaintiff title in fee-simple to the said Monarch and Mammoth Pearl veins and mining claims was issued in pursuance of and based upon an entry for patent made by said grantors of plaintiff and a receiver's

receipt delivered to said grantors of plaintiff long prior to the pretended location of the said Ithica Tunnel site, and long prior to the commencement of said Ithica tunnel, and on or about, to wit, the 6th day of March, 1895, and that all of the United States patents issued to plaintiff or its grantors covering and conveying to it or them said mining claims were based upon mining locations and upon applications for patent made long prior to the date of the pretended location of the said Ithica Tunnel site, and long prior to the commencement of the said Ithica tunnel, which locations were completed by the filing of location certificates on or about the following dates, to wit, Mammoth Pearl, September 25th, A. D. 1891; Monarch, September 25th, A. D. 1891; Apex, December 29th, A. D. 1891, and Champion, September 27th, A. D. 1892.

That the patents issued by the United States to plaintiff or its grantors for said Mammoth Pearl, Monarch, Apex, and Champion lodes and mining claims not only expressly convey to plaintiff or its grantors title in fee-simple to the territory within said claims as located and patented, together with all veins, lodes, or ledges of mineral-bearing rock in place upon which the same were located, but also in express terms convey to plaintiff or its grantors title in fee-simple to all other veins, lodes, and ledges throughout their entire depth, having their tops or apexes within the surface
62 boundaries of said mining claims extended downward vertically.

III.

Plaintiff, replying to defendant's pretended second and separate answer heretofore filed here—

Denies each and every allegation in said second pretended defense and separate answer contained, save and except such allegations as shall be hereinafter expressly admitted or expressly denied.

Admits that one A. H. Weber was, on the 19th day of August, 1895, a citizen of the United States, and that on or about the 20th day of August, 1895, he filed with the clerk and recorder of El Paso county aforesaid an instrument denominated a location certificate, containing the name of Ithica Tunnel site and the description in said defense stated, and that the same was recorded in Book 214, at page 324, of said county records.

Admits that said Ithica tunnel is the excavtion in said plaintiff's complaint described.

Admits that the said tunnel has reached a depth of about 1,365 feet from its face, but no more.

Admits that defendant extracted and removed four hundred ($400) dollars' worth of ore from one of the veins cut in said tunnel, as in said defense averred, but denies that said four hundred ($400) dollars covers the value of all the ore mined and extracted by defendant from plaintiff's ground by means of said tunnel.

Denies that the discovery vein of the said alleged Victor Consolidated claim of defendant, if any such vein it has, is con-
63 tinuous and crosses both end lines of said claim, or that it extends entirely across the claims of plaintiff, or that it is a

cross-vein; denies that defendant is by virtue of such alleged Victor Consolidated claim or location or otherwise entitled to the use or possession of any territory or of any vein or veins of mineral within the exterior boundaries of plaintiff's said claims, or has any interest of any kind or nature whatsoever in such territory or veins.

Denies that defendant has been damaged by the temporary restraining order heretofore issued in this cause in the sum of ten thousand ($10,000) dollars or in any other sum or at all.

Denies that plaintiff at all times knew of or watched the construction of said tunnel and remained silent when it should have spoken, and alleges the fact to be that plaintiff had no notice or knowledge whatever that defendant had, by means of said tunnel, entered upon plaintiff's said premises, and was extending the same therein, until on or about the month of November, 1896, and that thereafter and on or about the 21st day of November, 1896, plaintiff caused a notice to be served upon defendant, forbidding defendant to proceed further into plaintiff's premises with its said excavation or tunnel, and commanding it to desist from removing any ores therefrom, and that thereafter and on or about the 21st day of January, 1897, plaintiff, being informed and believing that defendant had failed to obey said notice, caused to be served upon defendant a second notice of similar tenor and effect.

IV.

For a second and further replication to defendant's pretended second and separate answer filed herein, plaintiff says:

64 That the patent from the United States conveying to the grantors of plaintiff title in fee-simple to said Apex vein and mining claim was issued long prior to the pretended location of the said Ithica Tunnel site and long prior to the commencement of said Ithica tunnel, and on or about, to wit, April 22nd, 1895; that the United States patent conveying to the grantors of plaintiff title in fee-simple to the Monarch and Mammoth Pearl veins and mining claims was issued in pursuance of and based upon an entry for patent made by the grantors of plaintiff, and a receiver's receipt delivered to the grantors of plaintiff long prior to the pretended location of the said Ithica Tunnel site and long prior to the commencement of the said Ithica tunnel, and on or about, to wit, the 6th day of March, 1895, and that all of the United States patents issued to plaintiff and its grantors and covering the conveying to it and them said mining claims were based upon mining locations and upon applications for patents made long prior to the date of the pretended location of the said Ithica Tunnel site and long prior to the commencement of the said Ithica tunnel, which locations were completed by the filing of location certificates on or about the following dates, to wit: Mammoth Pearl, September 25th, A. D. 1891; Monarch, September 25th, A. D. 1891; Apex, December 29th, A. D. 1891, and Champion, September 27th, A. D. 1892.

That the United States patents conveying to the grantors of plaintiff the said mining claims, to wit, the Mammoth Pearl, Monarch,

and Apex, were and each of them was based upon mining
65 locations and upon applications for patents made long prior to the date of the pretended location of the said Victor Consolidated claim in said second and separate defense mentioned, which locations of plaintiff's claims were completed by the filing of location certificates, as aforesaid, on or about the following dates, to wit: the Mammoth Pearl, September 25th, 1891; the Monarch, September 25th, 1891, and the Apex, December 29th, 1891.

That said United States patents, to wit, the Monarch and Mammoth Pearl patent, United States survey No. 7913, and the Apex patent, United States survey No. 8178, expressly convey to the grantors of plaintiff not only title in fee-simple to all of the territory in conflict between said mining claims and the said alleged Victor Consolidated claim, together with the veins then discovered and upon which said claims of plaintiffs were located, but also in express terms convey to grantors of plaintiff title in fee-simple to all other veins, lodes, and ledges of mineral-bearing rock throughout their entire depth, having their tops or apices within the surface boundaries of said claims extended downward vertically, with a right to the perpetual and exclusive use and enjoyment thereof, and that the United States patent issued to defendant or its grantors for the said alleged Victor Consolidated mining claim expressly excludes and excepts from the grant therein made all of said conflicting territory and also all of said veins, lodes, and ledges, without exception, throughout their entire depth, having their tops or apices therein.

That the vein or veins cut by defendant's said Ithica tunnel at a depth of 927 and 961 feet respectively from the mouth of said
66 tunnel are not cross-veins or, if but one, is not a cross-vein as to the said Apex mining claim, but the same appears by plaintiff's explorations, so far as made and according to its best information, to be but one vein and to extend lengthwise and apex within the exterior boundary lines of said Apex claim.

V.

For a third and further replication to defendant's said pretended second and separate answer or defense in its said answer pleaded, plaintiff says:

That under and in pursuance of law and the rules and regulations of the United States land office, which govern and regulate the patenting of public lands of the United States, the applicant for patent is required to file an instrument denominated "Application to purchase," in which instrument he must, among other things, particularly describe the territory he desires to enter and patent; that in pursuance of such rules and regulations defendant or its grantor filed its application to purchase or enter the said Victor Consolidated claim in its answer mentioned, and embodied in such application a description of the premises it sought to include therein; that in and by said application to purchase all the territory covered by the original pretended location of the said Victor Consolidated claim of defendant, and also within the boundary lines of the said Mammoth

Pearl, Monarch, and Apex mining claims, belonging to plaintiff, was expressly excluded and excepted from the grant sought by defendant or its grantor, and any and all right to or interest in any of said conflicting territory was then and thereby voluntarily and
67 affirmatively relinquished by defendant or its grantor, and that in and by said application to purchase or enter defendant or its grantor also expressly and voluntarily excluded and excepted from the grant sought all veins, lodes, or ledges of mineral-bearing rock having their tops or apices within said excluded, excepted, and relinquished conflicting ground throughout their entire depth, and resigned and renounced any and all right to or interest in said veins, lodes, or ledges; that the receipt afterwards issued by the receiver of the United States land office to defendant or its grantor for the said Victor Consolidated claim, in pursuance of said application to purchase or enter, likewise expressly excepted and excluded from said Victor Consolidated entry for patent all of said conflicting ground or territory and all of the said veins, lodes, or ledges having their tops or apices therein.

That the patent issued by the United States to defendant or its grantor under and in pursuance of said application to purchase or enter said Victor Consolidated claim, and under and in pursuance of the receiver's receipt so issued therefor, also affirmatively and expressly reserved, excepted, and excluded from the grant thereby made all of said conflicting territory and all of said veins, lodes, or ledges aforesaid, throughout their entire depth, having their tops or apices therein.

That the United States patents issued to the grantors of plaintiff for the said Mammoth Pearl and Monarch mining claims, survey No. 7913, and for the said Apex mining claim, survey No. 8178, include and cover all of said conflicting ground and all of said veins, lodes, and ledges, without exception, having their tops or apices
68 therein, throughout their entire depth, and convey the same to the grantors of plaintiff by free, clear, and unincumbered title, in fee-simple, together with the corresponding right to the exclusive use and enjoyment thereof, all of which title, rights, and uses have been heretofore duly conveyed to plaintiff.

By reason of which facts, matters, and things last above stated plaintiff respectfully pleads that defendant is now estopped and forever barred from setting up, as against this plaintiff and its grantees, any claim of right to or interest in such conflicting territory or said lodes, veins, and ledges having their tops or apices therein, under and by virtue of its alleged location and patent of the said Victor Consolidated Lode mining claim.

And plaintiff further alleges that in view of the other matters and things in this replication set forth defendant has, by virtue of its alledged tunnel-site location and its said tunnel, or its said Victor Consolidated location and patent, or otherwise, no legal or equitable right of any kind whatever to or interest in any of the territory covered by plaintiff's said patents to the said Mammoth Pearl, Monarch, Apex, and Champion claims, or in or to any or either of the ten veins cut by its said tunnel, or in or to any other veins, lodes,

or ledges having their tops or apices within the last-named mining claims, and that in running said tunnel upon plaintiff's ground and in the removal of ore therefrom defendant became and was trespasser, and the matters and things in said answer of defendant averred are in all respects wholly insufficient to constitute a legal and equitable excuse or defense.

69 Wherefore plaintiff repeats its prayer for the specific relief asked for in the complaint, and for such other and further relief as to the court may seem meet and proper.

J. C. HELM,
COLBURN & DUDLEY,
Att'ys for Plaintiff.

STATE OF COLORADO, }
County of El Paso, } *ss:*

Chas. H. Dudley, being first duly sworn, on oath deposes and states that he is the secretary of the plaintiff above named, The Ajax Gold Mining Company; that he has read the foregoing replication and knows the contents thereof, and that the matters and things therein contained are true to the best of his knowledge, information, and belief.

CHAS. H. DUDLEY.

Subscribed and sworn to before me this — day of August, A. D. 1897.

——.

Endorsed: No. 4870. In the district court, El Paso county, Colo. The Ajax Gold Mining Company, plaintiff, *vs.* The Calhoun Gold Mining Company, defendant. Replication. Filed in the district court of El Paso county, Colorado, Aug. 10, 1897. Edgar Howbert, clerk, by E. C. Davis, deputy. Colburn & Dudley, Colorado Springs, Colo., attorneys for —.

Pleas before Honorable Horace G. Lunt, one of the judges of the district court of the fourth judicial district of the State of Colo-
70 rado, sitting within and for El Paso county, in said State, in division two thereof, at a term begun and held at the courthouse, in the city of Colorado Springs, in the county and State aforesaid, on the 7th day of September (it being the first Tuesday in September), A. D. 1897, and of the Independence of the United States the one hundred and twenty-first.

Present: Hon. Horace G. Lunt, judge aforesaid; Henry McAllister, Jr., district attorney; W. S. Boynton, sheriff of said county; Edgar Howbert, clerk of said court.

Attest: EDGAR HOWBERT, *Clerk.*

Be it remembered that heretofore and on, to wit, the 13th day of September, A. D. 1897, the same being one of the days of the regular September, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} Injunction, etc.

At this day in open court comes the said plaintiff, by J. C. Helm, Esq., its attorney, and the said defendant, by W. E. So Relle, its attorney, also comes, and thereupon, by consent, it is ordered by the court that said defendant may have leave to amend its answer
71 herein by interlineation, and that said plaintiff have leave to amend its replication herein by interlineation.

And thereupon and on the same day the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} Injunction, etc.

At this day in open court comes the said plaintiff, by J. C. Helm, Esq., its attorney, and the said defendant, by W. E. So Relle, its attorney, also comes; and thereupon this cause, coming on for hearing before the court upon the motion of said plaintiff to strike out the third paragraph of the first defense of the answer of said defendant, is argued by counsel and submitted to the court and is by the court granted; and thereupon, by consent—

It is ordered by the court that the amendment filed herein today stand as the amendment to the answer herein.

And thereupon and — the same day the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} Injunction, etc.

72 At this day in open court comes the said plaintiff, by J. C. Helm, Esq., its attorney, and the said defendant, by W. E. So Relle, Esq., its attorney, also comes; and thereupon this cause, coming on for hearing before the court upon the motion of said defendant to dissolve the injunction heretofore issued herein, is argued by counsel and submitted to the court and is by the court denied.

And thereupon and on, to wit, the same day, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} Injunction, etc.

At this day in open court comes the said plaintiff, by J. C. Helm, Esq., its attorney, and the said defendant, by W. E. So Relle, Esq., its attorney, also comes; and thereupon, by consent—

It is ordered that upon the giving by said defendant of a good and sufficient bond, condition in the penal sum of $2,500.00 and with surety or sureties to be approved by the clerk of this court, a temporary writ of injunction may issue restraining the said plaintiff from working the vein known as vein No. 9 in the Ithica tunnel, in the Cripple Creek mining district, El Paso county, Colorado.

73 And it is further ordered by the court that the bond heretofore required of said plaintiff be increased to the sum of $2,500.00, with sureties to be approved by the clerk of this court.

And thereupon and on, to wit, the same day, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} Injunction, etc.

And thereafter and on, to wit, the 11th day of October, A. D. 1897, there was filed in the office of the clerk of said court the motion, which is in words and figures as follows, to wit:

STATE OF COLORADO, }
County of El Paso, } *ss:*

In the District Court.

THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} Motion.

Comes now the defendant above named and moves this honorable court for an order permitting the defendant, its agents and employees, to enter upon the premises described in plaintiff's complaint at any and all times prior to the trial of said cause for the following purposes, to wit:

74 First. To clean out, examine, inspect, and survey any or all shafts, tunnels, and other excavations upon said premises.

Second. To make any and all excavations which defendant may

desire upon or from the surface of said premises for the purpose of exploring and exposing the veins or lodes claimed by defendant therein; to make any and all excavations necessary to expose from the surface upon and across the premises described in said complaint the vein or veins of the Victor Consolidated claim, U. S. patent survey No. 8747.

Third. To enter into the Ithica tunnel, described in defendant's answer, and from said tunnel or the workings heretofore connected therewith to explore any and all veins or lodes intersected in said tunnel by means of raises, drifts, or cross-cuts; to cause a raise to be made from said tunnel to the surface upon the vein denominated in said answer Ithica Tunnel No. 9 lode; to cause drifts to be run upon said last-mentioned vein entirely across the premises described in plaintiff's complaint.

Fourth. Defendant further moves this honorable court for an order and instructions relative to the disposition of the ores which may be discovered or extracted in the construction of said drifts and raises.

W. E. SO RELLE,
Attorney for Defendant.

Endorsed: In the district court. No. 4870. The Ajax Gold Mining Co., plaintiff, *vs.* The Calhoun Gold Mining Co., de-
75 fendant. Motion and notice to expose veins. Filed in the district court of El Paso county, Colorado, Oct. 11, 1897. Edgar Howbert, clerk, by E. C. Davis, deputy.

And thereafter and on, to wit, the 16th day of November, A. D. 1897, the same being one of the days of the regular September, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant.

At this day in open court comes the said plaintiff, by J. C. Helm, Esq., its attorney, and the said defendant, by W. E. So Relle, Esq., its attorney, also comes; and thereupon this cause, coming on for hearing before the court upon the defendant's motion for leave to do certain development-work on the property in controversy herein, is argued by counsel and submitted to the court, and the court, not being sufficiently advised in the premises, doth take the same under advisement.

76 At this day in open court comes the said plaintiff, by J. C. Helm, Esq., its attorney, and the said defendant, by W. E. So Relle, Esq., its attorney, also comes; and thereupon, by consent—

It is ordered by the court that this case be set for trial on the 20th day of January, A. D. 1898.

And thereafter and on, to wit, the 18th day of October, A. D. 1897, the same being one of the days of the regular September, A. D.

1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant.

At this day in open court comes the said plaintiff, by Colburn and Dudley, its attorneys, and the said defendant, by W. E. So Relle, Esq., its attorney, also comes; and thereupon this cause, coming on for hearing before the court upon defendant's motion to be allowed to prove the cross-vein herein, is argued by counsel and submitted to the court, and the court, not being sufficiently advised in the premises, doth take the same under advisement.

77 And thereafter and on, to wit, the 16th day of November, A. D. 1897, the same being one of the days of the regular September, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant.

At this day in open court comes the said plaintiff, by J. C. Helm, Esq., its attorney, and the said defendant, by W. E. So Relle, Esq., its attorney, also comes; and thereupon this cause, coming on for hearing before the court upon the defendant's motion for leave to do certain development-work on the property in controversy herein, is argued by counsel and submitted to the court, and the court, not being sufficiently advised in the premises, doth take the same under advisement.

Pleas before Honorable Ira Harris, one of the judges of the district court of the fourth judicial district of the State of Colorado, sitting within and for El Paso county, in said State, in division 2 thereof, at a term begun and held at the court-house, in the city of Colorado Springs, in the county and State aforesaid, on the 10th day of January (it being the second Monday in January), A. D. 1898, and of the Independence of the United States the one hundred and twenty-second.

78 Present: Hon. Ira Harris, judge aforesaid; Henry McAllister, Jr., district attorney; Edgar Howbert, clerk of said court; W. S. Boynton, sheriff of said county.
Attest: EDGAR HOWBERT, *Clerk*.

Be it remembered that heretofore and on, to wit, the 17th day of January, A. D. 1898, the same being one of the days of the regular January, A. D. 1898, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant.

At this day in open court comes the said plaintiff, by its attorneys, Colburn & Dudley, Esqrs., and the defendant, by its attorney, W. E. So Relle, also comes.

And thereupon, by consent, it is ordered by the court that the order heretofore entered whereby this cause was set for trial be, and the same hereby is, vacated.

Pleas before Honorable Horace G. Lunt, one of the judges of the district court of the fourth judicial district of the State of Colorado, sitting within and for El Paso county in said State, in
79 division one thereof, at a term begun and held at the courthouse, in the city of Colorado Springs, in the county and State aforesaid, on the 10th day of January (it being the second Monday in January), A. D. 1898, and of the Independence of the United States the one hundred and twenty-second.

Present: Hon. Horace G. Lunt, judge aforesaid; Henry McAllister, Jr., district attorney; W. S. Boynton, sheriff of said county; Edgar Howbert, clerk of said court.

Attest: EDGAR HOWBERT, *Clerk.*

Be it remembered that heretofore and on, to wit, the 2nd day of February, A. D. 1898, the same being one of the days of the regular, A. D. 1898, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Order.

Upon hearing the application of plaintiff for dissolution of the injunction against it as to what is known as the No. 9 vein, plaintiff appearing by Messrs. Colburn and Dudley, its attorneys, and the defendant appearing by W. E. So Relle, Esq., its attorney—

80 It is ordered that the injunction against plaintiff in favor of defendant in connection with this cause be, and the same is hereby, dissolved.

Done in open court this 2nd day of February, A. D. 1898.

HORACE G. LUNT, *Judge.*

Pleas before Honorable Horace G. Lunt, one of the judges of the district court of the fourth judicial district of the State of Colorado, sitting within and for El Paso county, in said State, in division two thereof, at a term begun and held at the court-house, in the city of Colorado Springs, in the county and State aforesaid, on the 9th day of May, A. D. 1898 (it being the second Monday in May), and of the Independence of the United States the one hundred and twenty-second.

Present: Hon. Horace G. Lunt, judge aforesaid; Henry McAllister, Jr., district attorney; W. S. Boynton, sheriff of said county; Edgar Howbert, clerk of said court.

Attest: EDGAR HOWBERT, *Clerk.*

Be it remembered that heretofore and on, to wit, the 16th day of May, A. D. 1898, the same being one of the days of the regular May, A. D. 1898, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

81 THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction.

At this day in open court comes the said plaintiff, by Colburn & Dudley, Esqs., its attorneys, and the said defendant, by W. E. So Relle, Esq., its attorney, also comes. Thereupon, by agreement of the parties hereto and on motion of plaintiff, it is ordered by the court that the agreed statement of the facts in this cause heretofore filed herein by the said parties may be, and the same is hereby, withdrawn, and leave to file herein instanter a new agreed statement of such facts is hereby allowed; which is accordingly done.

And thereupon and on the same day the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction, etc.

82 At this day in open court comes the said plaintiff, by Colburn and Dudley, Esqrs, its attorneys, and the said defendant, by W. E. So Relle, Esqr., its attorney, also comes. Thereupon this cause coming on regularly for trial before the court upon the agreed statement of facts filed herein by the said parties, the questions at issue herein are argued by counsel and submitted to the court, and the court, being now sufficiently advised in the premises, doth find the issues herein joined in favor of said plaintiff and against said defendant, and that said plaintiff is entitled to the possession and occupancy of the property in controversy herein; that there is due and owing from said defendant to the said plaintiff the sum of four hundred ($400.00) dollars, and—

It is further ordered that the temporary injunction heretofore granted herein on the 27th day of March, A. D. 1897, be, and the same is hereby, made permanent and perpetual, and it is further

ordered that judgment in accordance with said finding and for costs be entered herein in favor of said plaintiff and against said defendant, and that the same be recorded in the judgment book.

To which findings and ruling of the court said defendant duly excepts.

Which said judgment is in words and figures as follows, to wit:

83 THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} Judgment.

Now, on this the 16th day of May, A. D. 1898, this cause, by agreement of parties, coming on to be heard before the court, without a jury, upon the pleadings and upon the stipulation of parties duly filed and upon the exhibits offered in evidence, Messrs. Colburn & Padley and J. C. Helm, Esq., appearing for plaintiff, and W. E. So Relle, Esq., appearing for defendant, and the court, having heard the arguments of counsel and having duly considered said stipulation and the said pleadings and exhibits and now being fully advised in the premises, doth find—

That the matters and things stated in the complaint are true, and that the plaintiff is and at the commencement of this suit was the owner in fee of the said Apex, Mammoth Pearl, and Monarch Lode mining claims in the complaint described, and was entitled to the sole and exclusive, peaceable, and undisturbed possession of each and every part thereof, including all veins, lodes, or ledges having their tops or apices therein, but that defendant, without plaintiff's knowledge or consent, entered into and upon a portion of plaintiff's said premises, below the surface thereof, and extended its excavation, the said Ithica tunnel in the pleadings mentioned, about 900 feet therein; that in said tunnel defendant cut several veins
84 of mineral-bearing rock in place and took out and removed therefrom and converted to its own use a large quantity of ore belonging to plaintiff, the same being of the value of $400.00; that defendant was at the commencement of this action further extending said excavation or tunnel into plaintiff's said premises and taking out and removing additional ore therefrom, and was threatening to continue said wrongful acts.

And the court further finds that at and prior to the commencement of this action defendant was the owner in fee of the Victor Consolidated Lode mining claim in the answer described, and that the apex of the vein thereof exposed in the discovery shaft is continuous throughout the length of said claim, and is a cross-vein on the strike to plaintiff's Monarch and Mammoth Pearl and the veins thereof and to the vein of the Apex claim; that the vein of the said Victor Consolidated claim was not known to exist prior to its discovery in said discovery shaft by defendant and its grantors; that prior to the commencement of this action and on, to wit, the 19th day of August, A. D. 1895, the defendant located a tunnel site called

the Ithica Tunnel site, under section 2323 of the Revised Statutes of the United States, and thereafter prosecuted work in said tunnel with great diligence until enjoined by order of this court, and that said tunnel has reached a depth of 1,365 feet from the face thereof; that the face of said tunnel at the date of its location was upon unappropriated public domain, and the line thereof crosses plaintiff's claims, and also the territory originally in conflict between them and defendant's Victor Consoli-
85 dated claim; that the veins cut by said tunnel within the side lines of plaintiff's claims do not appear on the surface and were not known to exist prior to the location of said tunnel site; that the location of said Ithica Tunnel site was long subsequent to the location of each and every of plaintiff's said lode claims, and was also subsequent to the issue of patents by the United States Government for plaintiff's said Apex Lode mining claim, and also subsequent to the issuance of and delivery of the receiver's receipt and final entry in the United States Land Office of plaintiff's said Monarch and Mammoth Pearl Lode mining claims, but said tunnel was located prior to the issuance of patents for said Monarch and Mammoth Pearl claims; that the location of defendant's Victor Consolidated claim was subsequent to the location of each and every of plaintiff's said lode mining claims, and was also subsequent to the application for patent in the United States Land Office therefor and while said patent proceedings were pending.

And the court further finds that in the application to the United States Land Office for patent to defendant's said Victor Consolidated lode claim, and also in the application of said Land Office to purchase the same, likewise in the receiver's receipt issued upon the final entry thereof, and from the grant contained in the United States patent issued thereto, all of the surface contained in each and every of plaintiff's said lode claims conflicting with the said Victor Consolidated lode claim, together with all veins, lodes, or ledges having their tops or apexes in said conflicting surface, was expressly excluded and excepted, and that all of said surface so in con-
86 flict between plaintiff's said mining claims and the said Victor Consolidated lode claim of defendant, together with all of said veins, lodes, or ledges having their tops or apexes therein, was included in the grant and conveyed by the United States patents issued for plaintiff's said lode claims.

Wherefore it is hereby ordered, adjudged, and decreed that plaintiff is the owner in fee and is entitled to the exclusive, peaceable, and undisturbed possession of said premises, to wit, the said Apex Lode mining claim, patent survey No. 8178, and the said Monarch and Mammoth Pearl Lode mining claims, patent survey No. 7913, the same being in the Cripple Creek mining district, county of El Paso and State of Colorado, together with all veins, lodes, or ledges having their tops or apexes therein, and including all that portion of the said Victor Consolidated vein within the side and end lines of the plaintiff's said claims extended downward vertically, and that plaintiff do have and recover of and from defendant its damages for the said wrongful entry thereon and for the said injuries thereto in

the sum of $400.00, together with its costs of suit herein laid out and expended, and that execution issue therefor.

And it is further ordered, adjudged, and decreed that the temporary injunction heretofore issued herein, enjoining and restraining defendant, its officers, agents, and employees, from further prosecuting or extending said tunnel and from entering upon or within or underneath plaintiff's claims and from further taking out, extracting, or removing ore by means of said tunnel or otherwise from within the side
87 and end lines of plaintiff's said claims extended downward vertically, be, and the same is hereby, made perpetual, and that defendant, its officers and employees, be, and they are hereby, forever enjoined from the renewal of each or any of said wrongful acts.

By the court:

HORACE G. LUNT, *Judge.*

And thereupon and on the same day the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction, etc.

At this day, in open court, comes the same defendant, by W. E. So Relle, Esq., its attorney, and prays an appeal to the supreme court of the State of Colorado, which is allowed upon condition that it file herein within thirty days from this day its appeal bond, conditioned in the sum of five hundred ($500) dollars, with sureties, to be approved by the clerk of this court.

And time and until sixty days from this day is hereby allowed to said defendant within which to prepare and tender to Honorable Horace G. Lunt, one of the judges of this court, its bill of exceptions by it reserved herein, which, when signed and sealed by the said judge, shall be filed herein as of this day.

88 And thereafter and on to wit, the 14th day of June, A. D. 1898, there was filed in the office of the clerk of said court the following appeal bond, which is in words and figures, to wit:

Know all men by these presents that we, the Calhoun Gold Mining Company, as principal, and the Fidelity and Deposit Co. of Md., a corporation doing business under the laws of the State of Colorado, are held and firmly bound unto the Ajax Gold Mining Company in the penal sum of five hundred dollars; for the payment of which, well and truly to be made, we and each of us bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Denver, Colorado, this 14th day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

The condition of the above obligation is such that whereas the said The Ajax Gold Mining Company did on the 16th day of May, one thousand eight hundred and ninety-eight, at a term of the district court then being holden within and for the county of El Paso

and State of Colorado, obtain a judgment against the above-bounden The Calhoun Gold Mining Co. for the sum of four hundred dollars and — cents and cost of suit, from which judgment the said The Calhoun Gold Mining Company has prayed for and obtained an appeal to the supreme court of said State of Colorado:

Now, if the said The Calhoun Gold Mining Co. shall duly prosecute said appeal and shall, moreover, pay the amount of the
89 said judgment, costs, interests, and damages rendered and to be rendered against The Calhoun Gold Mining Co., the said defendant, in case the said judgment shall be affirmed in the said supreme court, then the above obligation to be null and void; otherwise to remain in full force and virtue.

THE CALHOUN GOLD MINING COMPANY,
By A. H. WEBER,
Vice-President. [SEAL.]

Attest: JAMES QUINN, JR., *Secretary.*

THE FIDELITY AND DEPOSIT CO. OF MD.,
By GUY LE R. STEVICK, [SEAL.]
Member of Local Board.

Attest:
[SEAL.]
FRANCIS A. CHAPMAN,
For Chapman & Maitland, General Agents. [SEAL.]

STATE OF COLORADO, } *ss:*
County of Arapahoe, }

Guy Le R. Stevick, a member of the local board of directors of the Fidelity and Deposit Company of Maryland, the surety in the foregoing bond, and Francis A. Chapman, a member of the firm of Chapman & Maitland, the duly authorized agents of the said The Fidelity & Deposit Company of Maryland, being duly sworn, depose and say that the said surety company is a corporation of the State of Maryland carrying on the business of a surety company in the State of Colorado; that said surety company has fully complied with all of the laws of the State of Colorado relating to surety companies doing business in this State, and particularly has complied with the requirements and provisions of the act concerning surety
90 companies approved March 31st, 1897; that affiants are respectively the officers and agents of the said company, as hereinbefore stated, and that as such officers and agents they are duly authorized to execute the bond hereto annexed on behalf of the said company; that said surety company is authorized by its articles of incorporation and by its laws to execute the bond hereto annexed, and that such company has assets consisting of capital stock paid up in cash and surplus, over and above all of its liabilities, exceeding the sum of $2,000,000 *dollars.*

GUY LE R. STEVICK.
FRANCIS A. CHAPMAN.

Subscribed and sworn to before me this 14th day of June, A. D. 1898. My commission will expire Feb'y 18, 1901.

MAUDE L. SELVY,
[SEAL.] *Notary Public.*

Endorsed: No. 4870. Appeal bond. The Ajax Gold Mining Company *vs.* The Calhoun Gold Mining Company. Approved and filed in the district court of El Paso county, Colorado, Jun- 14, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

I, Edgar Howbert, clerk of the district court of the fourth judicial district of the State of Colorado within and for El Paso county, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the complaint, injunction writ, petition for
91 removal, answer, replication, appeal bond, and all orders had and entered of record in a certain cause lately pending in said court on the civil side thereof, wherein The Ajax Gold Mining Company was plaintiff and The Calhoun Gold Mining Company was defendant, as the same appear on file and of record in this office remaining.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Colorado Springs, this 12th day of Sept., A. D. 1898.

EDGAR HOWBERT, *Clerk*,
[SEAL.] By M. L. TAYLOR, *Deputy*.

Revenue stamp.

92 STATE OF COLORADO, } ss:
County of El Paso, }

In the District Court of the Fourth Judicial District of the State of Colorado, Sitting within and for said County of El Paso.

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Bill of Exceptions.

Be it remembered that on the sixteenth day of May, A. D. 1898, at the hour of ten o'clock a. m. of said day, before the Honorable Horace G. Lunt, judge of said court, upon the trial and hearing of said cause under and by virtue of the stipulations and agreed statement of facts hereto annexed, the following proceedings were had, to wit:

Appearances.

Messrs. Colburn and Dudley and J. C. Helm, Esq., appearing as counsel for the plaintiff, and W. E. So Relle, Esq., appearing as counsel for the defendant.

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93 STATE OF COLORADO, } ss:
County of El Paso, }

In the District Court of the Fourth Judicial District, Sitting within and for said County of El Paso.

THE AJAX GOLD MINING COMPANY, Plaintiff, }
vs. } Stipulation.
THE CALHOUN GOLD MINING COMPANY, Defendant. }

Whereas the following pleadings have been filed in this cause, to wit, complaint, answer, and replication; and

Whereas it is evident from said pleadings that certain questions of law are involved in the cause, a determination of which may be decisive, said questions of law being as follows, to wit:

First. Whether or not the Ithica tunnel in said pleadings described is entitled to a right of way through plaintiff's lode claims.

Second. Whether or not defendant has acquired by virtue of said tunnel and tunnel-site location the ownership and right to the possession of the blind veins cut therein, to wit, veins or lodes not appearing on the surface and not known to exist prior to the date of location of said tunnel site.

Third. Whether or not defendant is the owner and entitled to the ore contained in the vein of its Victor Consolidated claim within the surface boundaries and across plaintiff's lode claims.

94 Fourth. Whether or not defendant may, in this cause, introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl claims of plaintiff prior to the location of said tunnel site; but,

Whereas, in order to properly present said questions of law at this time it is necessary that certain matters of fact, which appear as controverted by the pleadings, be treated as established, and that the hearing thereon be regarded as a trial of the cause:

Now, therefore, it is stipulated that the court may try the cause and determine the aforesaid legal propositions, considering in conjunction with the pleadings the following agreed statement of facts, viz:

1. That the record titles of the Apex, Monarch, and Mammoth Pearl claims are vested in plaintiff, and that the record titles of the Victor Consolidated claim and the Ithica tunnel site and veins discovered therein are vested in defendant.

2. That the map or plat heretofore filed by defendant, showing plaintiff's lode claims and the defendant's said Ithica tunnel and the veins discovered therein and the Victor Consolidated lode claim, is in evidence, marked Exhibit "A," and is correct; that the Champion Lode claim of plaintiff need not be adjudicated in the present trial of this cause.

3. That on the issue made by the answer and replication, as to whether mineral in place was discovered on plaintiff's said Monarch and Mammoth Pearl Lode claims or in the discovery shafts

thereof prior to the date of the location of the said Ithica
95 tunnel site, defendant offered testimony tending to negative such a discovery, but which testimony was, on plaintiff's objection, ruled out by the court, such ruling being duly excepted to by defendant.

4. That the Ithica tunnel cuts certain blind lodes in the pleadings mentioned, crossing the lines thereof within plaintiff's said territory—that is, lodes that do not appear on the surface and not known to exist prior to the date of the location of the said tunnel site; that said veins were intersected in said tunnel at the following distances from the face thereof, to wit:

Vein No. 1 at 138 feet.
Vein No. 2 at 165 feet.
Vein No. 3 at 356 feet.
Vein No. 4 at 425 feet.
Vein No. 5 at 581 feet.
Vein No. 6 at 643 feet.
Vein No. 7 at 681 feet.
Vein No. 8 at 926 feet.
Vein No. 9 at 961 feet.

The respective dates of the discovery of said veins are as shown in the answer.

5. That the said Ithica tunnel-site location is in form in compliance with law, and the location of each of said tunnel veins was made as described in defendant's answer and in the manner recognized by the case of Ellet *v.* Campbell, 167 U. S. Rep., —; that the mouth or face of said tunnel was at the date of its location on public domain, and that the defendant has prosecuted work diligently and continuously upon said tunnel from the date of its location until enjoined by this court.

6. That the apex of defendant's Victor Consolidated vein passes through the discovery shaft and the northerly end line, in-
96 cluding a portion of the northerly end territory of the Victor Consolidated claim, and that said vein is continuous throughout the length of said claim; that the apex of said vein also passes through the south end line of plaintiff's said Apex claim and extends northerly within the boundaries of said Apex claim 550 feet from the said south end line and crosses the westerly side line of said claim; that said vein, after passing out of said Apex claim, also passes entirely through and crosses plaintiff's said Monarch and Mammoth Pearl claims and the veins thereof; that said Victor Consolidated vein was not known to exist prior to defendant's discovery in said discovery shaft and location thereof as the Victor Consolidated vein.

7. That the location certificates of plaintiff's said claims, purporting to complete the locations thereof, were filed in the office of the county clerk of El Paso county, Colorado, on the following dates, to wit, Mammoth Pearl, September 25th, A. D. 1891; Monarch, September 25th, 1891; Apex, December 29, A. D. 1891; that the applications for patent for plaintiff's said claims were filed in the U. S. land office at Pueblo, Colorado, on the following dates, to wit, Monarch and

Mammoth Pearl, May 9, 1893; Apex, March 31, 1893; that receiver's receipts were issued by the officers of said land office to the plaintiff upon its said locations on the following dates, to wit, Monarch and Mammoth Pearl on the 6th day of March, A. D. 1895, and the Apex on the 16th day of January, A. D. 1895; that United States patents were issued to plaintiff upon its said claims at the following dates, to wit, Monarch and Mammoth Pearl, September 6th, A. D. 1895, and the Apex, April 22, A. D. 1895.

8. That defendant's said Ithica tunnel site was located on the 19th day of August, A. D. 1895; that the location certificate
97 of the said Victor Consolidated Lode claim, purporting to complete the location thereof, was filed in the office of the county clerk of said county on the 2nd day of November, A. D. 1893; that the application for patent upon said claim was filed in said U. S. land office on the 23rd day of April, A. D. 1894; that the receiver's receipt was issued to defendant by the officers of said land office on the 3rd day of September, A. D. 1896; that United States patent was issued to defendant upon its said lode claim on the 25th day of January, A. D. 1897.

9. That the following instruments, to wit, original patents of the said Apex, Monarch, and Mammoth Pearl claims of plaintiff and the original patent of the Victor Consolidated claim of defendant, also the certified copy of the application for patent and application to purchase, and, likewise, a certified copy of the receiver's receipt for said Victor Consolidated claim, are filed herewith, marked respectively Exhibits "B," "C," "D," "E," "F," and "G," "H," "I," "J," &c.; that said instruments are in evidence and before the court; also original or certified copies of location certificates of all of said tunnel locations and Victor Consolidated Lode claims and of said Ithica Tunnel site.

Provided that when a decision is rendered by the court determining the aforesaid questions of law, based upon the pleadings, documents, and matters of fact hereinabove stipulated, final judgment shall be entered thereon, and the losing party may take the same to the supreme court of the State and of the United States for review upon the record so made as in other cases, and in the event of such review this stipulation, together with the said map, patents, and
98 other exhibits, shall, when properly attested by the clerk, constitute the bill of exceptions, and thus be made a part of the record.

Provided, further, that in the event of a reversal or partial reversal of such judgment and a retrial of the cause each and every of the foregoing matters may be put in issue, and the hearing of such issues upon the evidence and otherwise shall in no manner be controlled or affected by this stipulation.

Dated at Colorado Springs, Colo., this 24th day of March, A. D. 1898.

COLBURN AND DUDLEY AND
J. C. HELM,
Attorneys for Plaintiff.
W. E. SO RELLE,
Attorney for Defendant.

Endorsed: No. 4870. District court, El Paso county. The Ajax Gold Mining Co., pl'ff, *vs.* The Calhoun Gold Mining Co., def't. Stipulation. Set for 1 hour's arg., April 15th, '98. Filed in the district court of El Paso county, Colorado, May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

STATE OF COLORADO, }
County of El Paso, } *ss:*

In the District Court.

THE AJAX GOLD MINING COMPANY, Plaintiff, }
vs. } Stipulation.
THE CALHOUN GOLD MINING COMPANY, Defendant. }

99 It is hereby stipulated and agreed by and between the plaintiff and defendant that all exhibits specified in the stipulation bearing date March 24th, 1898, and filed May 16th, 1898, may be filed by the clerk as of date May 16th, 1898.

Dated at Denver, Colo., June 18th, 1898.

COLBURN AND DUDLEY AND
J. C. HELM,
Attorneys for Plaintiff.
W. E. SO RELLE,
Attorney for Defendant.

General Land Office, No., 25530; mineral certificate No. 535.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field-notes of survey and the certificate No. 535 of the register of the land office at Pueblo in the State of Colorado, accompanied by other evidence whereby it appears that Charles E. McRay, James E. McRay and George F. McRay did, on the sixteenth day of January, A. D. 1895, duly enter and pay for that certain mining claim or premises known as the Apex Lode mining claim, designated by the surveyor general as lot No. 8178, embracing a portion of section twenty-nine in township fifteen south of range sixty-nine west, sixth principal meridian, in the Cripple Creek mining district, in the county of El Paso,
100 and State of Colorado, in the district of lands subject to sale at Pueblo and bounded, described, and platted as follows, with magnetic variation as hereinafter stated.

Beginning at corner No. 1 a pine post five inches square marked 1–8178, with mound of stone, from which the south quarter corner of section twenty-nine in township fifteen south of range sixty-nine west, sixth principal meridian, bears south forty degrees and thirty-six minutes east two thousand two hundred and six-tenths feet distant; corner No. 3 of survey No. 7475, the Dead Pine Lode claim,

bears north one degree and twenty-one minutes east four hundred and sixty and forty-four-hundredths feet distant; a pine ten inches in diameter blazed and marked 1–8178 B. T. bears north forty-five degrees west one hundred and thirty-two and one-tenth feet distant, and an aspen four inches in diameter blazed and marked 1–8178 B. T. bears north seventy-six degrees and thirty-five minutes east forty and two-tenths feet distant.

Thence, first course, magnetic variation fourteen degrees and twenty-five minutes east, south sixty-seven degrees, forty minutes and thirty seconds west fifty-one and four-tenths feet intersect line 2–3 of said survey No. 7475 at south six degrees and fifty-six minutes west four hundred and eighty-three and four-tenths feet from corner No. 3; three hundred and forty-two and sixty-seven-hundredths feet to corner No. 2.

Thence, second course, magnetic variation fourteen degrees and twenty-five minutes east, north seven degrees and forty minutes east six hundred and fifty-four and eighty-three-hundredths feet to corner No. 3.

Thence, third course, magnetic variation thirteen degrees and forty-three minutes east, north five degrees and thirty-eight
101 minutes west seven hundred and ninety-two and fifty-seven-hundredths feet to corner No. 4.

Thence, fourth course, magnetic variation fourteen degrees east, north sixty-seven degrees, forty minutes and thirty seconds east two hundred and eighty-three and sixty-two-hundredths feet to corner No. 5, from which discovery shaft bears south fourteen degrees and twenty-four minutes west three hundred and fifty-five and two-tenths feet distant.

Thence, fifth course, magnetic variation thirteen degrees and fifty minutes east, south five degrees and thirty-eight minutes east seven hundred and ninety-two and fifty-seven-hundredths feet to corner No. 6.

Thence, sixth course, magnatic variation thirteen degrees and forty-three minutes east, south two degrees and fifty-nine minutes west one hundred and sixty-eight feet intersect line 3–4 of said survey No. 7475 at south eighty-three degrees and four minutes east thirteen and two-tenths feet from corner No. 3; six hundred and twenty-seven and four-tenths feet to corner No. 1, the place of beginning. Expressly excepting and excluding from these presents all that portion of the ground hereinbefore described, embraced in said mining claim or survey No. 7475 and also all that portion of said Apex vein or lode and of all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground; said lot No. 8178 extending one thousand four hundred and thirty-three and sixty-eight-hundredths feet in length along said Apex vein or lode, the granted premises in said lot containing eight acres and seventy-hundredths of an acre of land, more or less.

102 Now know ye, that there is therefore hereby granted by the United States unto the said Charles E. McRay, James E. McRay, and George F. McRay, and to their heirs and assigns, the said min-

ing premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said apex vein, lode, or ledge, and of all other veins, lodes, and ledges, throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said lot No. 8178 extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises; provided, that the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said lot No. 8178, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges; and provided further, that nothing herein contained shall authorize the grantees herein to enter upon the surface of a claim owned or possessed by another.

To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said grantees above named, and to their heirs and assigns forever; subject nevertheless, to the above-mentioned and the following conditions and stipulations:

First. That the premises hereby granted with the exception of the surface, may be entered by the proprietor of any other
103 vein, lode or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises for the purpose of extracting and removing the ore from such other vein, lode or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress, the legislature of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the twenty-second day of April, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

By the President: GROVER CLEVELAND,
By M. McKEAN, *Secretary.*
L. Q. C. LAMAR,
[SEAL.] *Recorder of the General Land Office.*

Recorded, vol. 266, pages 17 to 20, inclusive.

104 Endorsements: M. E. 535. Compared. Apex lode. 36844. Ex. B. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

STATE OF COLORADO, } ss:
County of El Paso, }

I hereby certify that this instrument was filed for record in my office at 9.21 o'clock a. m., March 18, 1897, and is duly recorded in Book 196, page 97.

J. W. BATES, *Recorder.*

2.10.

STATE OF COLORADO, } ss:
County of El Paso, }

I, Edgar Howbert, clerk of the district court of the fourth judicial district of the State of Colorado within and for El Paso county, do hereby certify the above and foregoing to be a true, perfect, and complete copy of United States patent—General Land Office No., 25530—issued April 22nd, 1895, to Charles E. McRay, James E. McRay, and George F. McRay, introduced as Exhibit — in case No. 4870, The Ajax Gold Mining Company *vs.* The Calhoun Gold Mining Company.

In witness whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court, at Colorado Springs, this 5th day of August, 1898.

EDGAR HOWBERT, *Clerk,*
By E. C. DAVIS, *Deputy.*

(Revenue stamp.)

105 General Land Office No., 26018; mineral certificate No. 575.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field-notes of survey and the certificate, No. 575, of the register of the land office at Pueblo, in the State of Colorado, accompanied by other evidence whereby it appears that J. A. Fiedler and the heirs of L. B. Hammond, deceased, did, on the sixth day of March, A. D. 1895, duly enter and pay for that certain mining claim or premises, known as the Monarch and Mammoth Pearl Lode mining claims, designated by the surveyor general as lot No. 7913, embracing a portion of section twenty-nine in township fifteen south of range sixty-nine west, sixth principal meridian, in the Cripple Creek mining district, in the county of El Paso and State of Colorado, in the district of lands subject to sale at Pueblo, and bounded, described and platted as follows, with magnetic variations as hereinafter stated:

Beginning for the description of the Monarch Lode claim at corner No. 1, a porphyry stone 2.4 x 1.6 x .7 feet, chiseled 1–7913 with mound of stone, from which the south quarter corner of section twenty-nine in township fifteen south, of range sixty-nine west, sixth principal meridian, bears south twenty-two degrees and thirty minutes east two thousand six hundred and ninety-seven and seven-tenths feet distant, and corner No. 2 of survey No. 7683, the Necessity Lode claim, bears south forty-four degrees and twenty
106 minutes west five hundred and ten and ninety-one-hundredths feet distant.

Thence, first course, magnetic variation thirteen degrees and fifty minutes each, south fifty-five degrees and thirty-two minutes west thirty-nine and thirty-two-hundredths feet intersect line 4–1 of said survey No. 7683; four hundred and nineteen and ninety-one-hundredths feet intersect line 2–3 of said survey No. 7683; four hundred and forty-eight and seventy-seven-hundredths feet intersect line 6–1 of survey No. 8178, the Apex Lode claim, at south two degrees and fifty-nine minutes west fifty-nine and one-tenth feet from corner No. 6; seven hundred and eighty-six and seventy-seven-hundredths feet intersect line 2–3 of said survey No. 8178 at south seven degrees and forty minutes west one hundred and forty-five and twenty-three-hundredths feet from corner No. 3; one thousand and four hundred and ninety-eight and five-tenths feet to corner No. 2.

Thence, second course, magnetic variation twelve degrees and twenty minutes east, north thirty-four degrees and twenty-eight minutes west one hundred and fifty feet to a point from which discovery shaft bears north fifty-five degrees and thirty-two minutes east seven hundred and fifty feet distant three hundred feet to corner No. 3.

Thence third course, magnetic variation twelve degrees and fifty-five minutes east, north fifty-five degrees and thirty-two minutes east nine hundred and fourteen and eighty-two-hundredths feet intersect line 3–4 of said survey No. 8178 at north five degrees and thirty-eight minutes west two hundred and twenty and fifty-five-hundredths feet from corner No. 3; one thousand two hun-
107 dred and twenty-four and eighty-six-hundredths feet intersect line 5–6 of said survey No. 8178 at north five degrees and thirty-eight minutes west two hundred and eighty-eight and sixty-five-hundredths feet from corner No. 6; one thousand three hundred and twenty-four and three-tenths feet intersect line 2–3 of said survey No. 7683; one thousand four hundred and ninety-eight and five-tenths feet to corner No. 4.

Thence, fourth course, magnetic variation fourteen degrees and two minutes east, south thirty-four degrees and twenty-eight minutes east two hundred and fifty-one and eighty-five-hundredths feet intersect line 4–1 of said survey No. 7683; three hundred feet to corner No. 1, the place of beginning; the survey of the lode as above described extending one thousand four hundred and ninety-eight and five-tenths feet in length along said Monarch vein or lode.

Beginning for the description of the Mammoth Pearl Lode claim

at corner No. 1, a porphyry stone 2.5 x 1.4 x .6 feet, chiseled 1–7913 with mound of stones, from which said quarter-section corner bears south twenty-two degrees and twenty-three minutes east, three thousand and twenty-eight and fifty-six-hundredths feet distant; corner No. 2 of said survey No. 7683 bears south nineteen degrees and twenty-two minutes west seven hundred and thirteen and eight-tenths feet distant, and corner No. 4 of said Monarch Lode claim bears south thirty-nine degrees and twelve minutes west seventy-eight and two-tenths feet distant.

Thence, first course, magnetic variation fourteen degrees and two minutes east, south fifty-two degrees and forty-two minutes west, two hundred and forty-one and thirty-three-hundredths feet
108 intersect line 2–3 of said survey No. 7683; three hundred and forty-six and thirty-nine-hundredths feet intersect at line 5–6 of said survey No. 8178; six hundred and sixty-five and fifty-eight-hundredths feet intersect line 3–4 of said survey No. 8178, one thousand four hundred and thirty-seven and eighty-seven-hundredths feet to corner No. 2.

Thence, second course, magnetic variation thirteen degrees and three minutes east, north thirty-seven degrees and eighteen minutes west one hundred and fifty feet to a point from which discovery shaft bears north fifty-two degrees and forty-two minutes east three hundred and thirty-five feet distant; also intersect line 4–1 of survey No. 7968, the Coriolanus Lode claim; three hundred feet to corner No. 3.

Thence, third course, magnetic variation thirteen degrees and twelve minutes east, north fifty-two degrees and forty-two minutes east five hundred and sixty-one and seventy-seven-hundredths feet intersect line 4–1 of said survey No. 7968; nine hundred and fifty-seven and thirty-four-hundredths feet intersect line 3–4 of said survey No. 8178; one thousand two hundred and seventy-six and fifty-three-hundredths feet intersect line 5–6 of said survey No. 8178; one thousand four hundred and thirty-seven and eighty-seven-hundredths feet to corner No. 4.

Thence, fourth course, magnetic variation twelve degrees and thirty minutes east, south thirty-seven degrees and eighteen minutes east thirty-three and thirty-nine-hundredths feet intersect line 2–3 of said survey No. 7683; three hundred feet to corner No. 1, the place of beginning; the survey of the lode as above described extending one thousand four hundred and thirty-seven and
109 eighty-seven-hundredths feet in length along said Mammoth Pearl vein or lode. Expressly excepting and excluding from these presents all that portion of the ground hereinbefore described, embraced in said mining claims or surveys Nos. 7683, 7968 and 8178 and also all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground, the granted premises in said lot No. 7913 containing eleven acres and five hundred and seventy-nine-thousandths of an acre of land, more or less.

Now know ye, that there *is* therefore hereby granted by the United

States unto the said J. A. Fiedler and the heirs of L. B. Hammond, deceased, and to their heirs and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said Monarch and Mammoth Pearl veins, lodes or ledges and of all other veins, lodes and ledges, throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said lot No. 7913 extended downward vertically, although such veins, lodes, or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises; provided, that the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end line of said lot No. 7913, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges: and provided further, that nothing herein contained shall authorize the grantees herein to enter upon the surface of a claim owned or possessed by another.

110 To have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said grantees above named, and to their heirs and assigns forever; subject nevertheless to the above-mentioned and the following conditions and stipulations:

First. That the premises hereby granted, with the exception of the surface may be entered by the proprietor of any other vein, lode, or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode, or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress, the legislature of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

111 In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the sixth day of September, in the year of our Lord one thousand eight hundred and

ninety-five, and of the Independence of the United States the one hundred and twentieth.

By the President:

GROVER CLEVELAND,
By M. McKEAN, *Secretary.*
L. Q. C. LAMAR,
[SEAL.] *Recorder of the General Land Office.*

Recorded, vol. 260, pages 205 to 210, inclusive.

(Endorsements:) Compared. M. & M. P. M. E. 575. 36843. Ex. C. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

STATE OF COLORADO, } ss:
County of El Paso, }

I hereby certify that this instrument was filed for record in my office at 9.20 o'clock a. m., March 18, 1897, and is duly recorded in Book 196, page 96.

J. W. BATES, *Recorder.*

2.30.

STATE OF COLORADO, } ss:
County of El Paso, }

I, Edgar Howbert, clerk of the district court of the fourth judicial district of the State of Colorado within and for El Paso
112 county, do hereby certify the above and foregoing to be a true, perfect, and complete copy of United States patent—General Land Office No., 26018—issued September 6th, 1895, to J. A. Feidler and the heirs of L. B. Hammond, deceased, introduced as exhibit in case No. 4870, The Ajax Gold Mining Company *vs.* The Calhoun Gold Mining Company.

In witness whereof I have hereunto set my hand and af-
[SEAL.] fixed the seal of said court, at Colorado Springs, this 5th day of August, 1898.

EDGAR HOWBERT, *Clerk,*
By E. C. DAVIS, *Deputy.*

Revenue stamp.

N. 4–219. H. G. P.
A. B. B.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June* 28, 1898.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy from pages 1 to 9, inclusive, of U. S. mineral patent No. 27757, issued in favor of the Calhoun Gold Mining Company upon the Victor Consolidated and Victor Consolidated No. 2 Lode claims, mineral certificate No. 975, Pueblo, Colorado,

land district, is a true and literal exemplification of the record of said mineral patent on file in this office.

In testimony whereof I have hereunto subscribed my [SEAL.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

BINGER HERMANN,
Commissioner of the General Land Office.

12499b–1 M.

113 General Land Office No., 27757; mineral certificate No. 975.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field-notes of survey and the certificate No. 975 of the register of the land office at Pueblo, in the State of Colorado, accompanied by other evidence, whereby it appears that the Calhoun Gold Mining Company did, on the third day of September, A. D. 1896, duly enter and pay for that certain mining claim or premises, known as Victor Consolidated and Victor Consolidated No. 2 Lode mining claims, designated by the surveyor general as lot No. 8747 embracing a portion of sections twenty-nine and thirty in township fifteen, south of range sixty-nine west, sixth principal meridian, in the Cripple Creek mining district, in the county of El Paso and State of Colorado, in the district of lands subject to sale at Pueblo, and bounded, described and platted as follows, with magnetic variation thirteen degrees and thirty minutes east.

Beginning for the description of the Victor Consolidated Lode claim at corner No. 1, a granite stone 24 x 10 x 3 inches, chiseled 1–8747 from which corner No. 1 of survey No. 8178, the Apex Lode claim, bears north twenty-three degrees and forty-nine minutes west one hundred and forty-seven and seventy-six-hundredths feet distant, the south quarter corner of section twenty-nine in township
114 fifteen south of range sixty-nine west, sixth principal meridian bears south forty-one degrees and forty-four minutes east two thousand and sixty and three-tenths feet distant, and the mouth of discovery cut and tunnel bears north sixty-four degrees and thirty-two minutes west one hundred and forty-nine and seventy-four-hundred- feet distant.

Thence, first course north eight degrees and fifty-two minutes west three hundred and twenty-two and thirty-eight-hundredths feet intersect line 6–1 of said survey No. 8178 at north two degrees and fifty-nine minutes east one hundred and eighty-four and seven-hundredths feet from corner No. 1; four hundred and forty and eleven-hundredths feet intersect line 3–4 of survey No. 7475 the Dead Pine Lode claim; five hundred and eleven and fifteen-hundredths feet intersect line 2–3 of the Hamburg Lode claim survey No. 8768; six hundred and fifty-nine and three-tenths feet intersect line 1–2 of the Monarch Lode claim survey No. 7913 A. M.; nine

hundred and ninety-two and ninety-three-hundredths feet intersect line 3–4 of said Monarch Lode claim; nine hundred and ninety-three and two-tenths feet intersect line 1–2 of the Mammoth Pearl Lode claim, survey No. 7913 A. M.; one thousand and twenty-two and forty-five-hundredths feet intersect line 3–4 of said Hamburg Lode claim at south eighty degrees and ten minutes east one hundred and thirty-six and seven-hundredths feet from corner No. 4; one thousand three hundred and thirty-three and twenty-seven-hundredths feet intersect line 3–4 of said Mammoth Pearl Lode claim; one thousand five hundred and two and two-tenths feet to corner No. 2.

115 Thence, second course, south seventy-two degrees and forty-four minutes west one hundred and forty-one and sixty-eight-hundredths feet corner No. 4 of said survey No. 8178, from which corner No. 3 of said claim bears south five degrees and thirty-eight minutes east seven hundred and ninety-two and fifty-seven-hundredths feet distant; two hundred and twenty-four and six-hundred-feet intersect line 1–2 of survey No. 7968, the Coriolanus Lode claim, at north fifty-three degrees and forty minutes west one hundred and three and forty-eight-hundredths feet from corner No. 1; three hundred and two and one-tenth feet to corner No 3.

Thence, third course, south ten degrees and twenty-two minutes east one hundred and ninety-nine and five-hundredths feet intersect line 4–1 of said survey No. 7968 at south thirty-seven degrees and forty-five minutes west one hundred and ninety-nine and thirty-eight-hundredths feet from corner No. 1; two hundred and eighty-two and fifty-four-hundredths feet intersect line 3–4 of said Mammoth Pearl Lode claim; three hundred and thirty-eight and eighteen-hundredths feet intersect line 3–4 of the Hallett Lode claim, survey No. 8768 at north eighty degrees and ten minutes west one hundred and sixty-nine and seventy-one-hundredths feet from No. 4; six hundred and two and eight-tenths feet interesect line 3–4 of said Monarch Lode claim; six hundred and nineteen and three-tenths feet intersect line 1–2 of said Mammoth Pearl Lode claim; eight hundred and twenty-nine and sixteen-hundredths feet intersect lines 4–1 of said Hallett and Hamburg Lode claims at south nine degrees and fifty minutes west four hundred and sixty-one and twenty-five-hundredths feet from corners Nos. 4 of said claims; nine

116 hundred and twenty-nine feet intersect line 1–2 of said Monarch Lode claim; one thousand and fifty-nine and one-tenth feet intersect line 2–3 of said survey No. 8178 at south seven degrees and forty minutes west three hundred and three and forty-three-hundredths feet from corner No. 3; one thousand three hundred and seventy and eighteen-hundredths feet intersect line 1–2 of said survey No. 8178, at south sixty-seven degrees forty minutes and thirty seconds west two hundred and thirty-one and forty-seven-hundredths feet from corner No. 1; one thousand four hundred and ninety-six and nine-tenths feet to corner No. 4.

Thence, fourth course, north seventy-two degrees and forty-four minutes east seventy-eight and thirteen-hundredths feet intersect line 2–3 of said Hamburg Lode claim; one hundred and thirty-one

and eleven-hundredths feet intersect line 3–4 of said survey No. 7475, two hundred and sixty-two and twenty-two-hundredths feet to corner No. 1 the place of beginning; the survey of the lode as above described extending one thousand four hundred and ninety-six and nine-tenths feet in length along said Victor Consolidated vein or lode.

Beginning for the description of the Victor Consolidated No. 2 Lode claim at corner No. 1, a pine post four inches square marked 1–8747, with mound of stone from which said quarter-section corner bears south sixty degrees and thirty-nine minutes east three thousand three hundred and seventy-two and nine-tenths feet distant; corner No. 3 of survey No. 8815, the Pearl Macy Lode claim, bears north twenty-three degrees and nine minutes east ninety-three
117 and seventy-nine-hundredths feet distant; a spruce tree ten inches in diameter blazed and marked B. T. 1–8747 bears north twenty-six degrees and thirty-five minutes west five and ninety-five-hundredths feet distant, and a spruce tree eight inches in diameter blazed and marked B. T. 1–8747 bears south five degrees and twelve minutes east ten and seventy-five-hundredths feet distant.

Thence, first course, north fifteen minutes west nine and seventy-one-hundredths feet intersect line 2–3 of said survey No. 8815 at south twenty-five degrees and forty-five minutes west eighty-four and ninety-seven-hundredths feet from corner No. 3; one hundred and fifty and sixty-two-hundredths feet to a point from which discovery shaft bears south seventy-seven degrees and forty-one minutes east one hundred and ninety feet distant, three hundred and one and twenty-four-hundredths feet to corner No. 2.

Thence, second course, south seventy-seven degrees and thirty-eight minutes east ninety and thirty-three-hundredths feet intersect line 2–3 of said survey No. 7968 at north thirty-seven degrees and forty-two minutes east forty-eight and fifty-eight-hundredths feet from corner No. 3; one hundred and seventeen and twenty-five-hundredths feet intersect line 4–1 of survey No. 8617, the Summit Lode claim; two hundred and thirty-three and thirty-two-hundredths feet intersect line 3–4 of survey No. 8088, the Big Theatre Lode claim at north fifty-eight degrees and thirty minutes west six hundred and ninety-six and eighty-one-hundredths feet from corner No. 4; three hundred and eight and eighty-four-hundredths feet intersect line 2–3 of survey No. 8822, the X-10-U-8 Lode claim; four hundred and twenty-one and eleven-hundredths feet intersect
line 4–1 of said survey No. 7968 at north thirty-seven
118 degrees and forty-five minutes east one hundred and eighty and ninety-nine-hundredths feet from corner No. 4; five hundred and fifty-seven and sixty-eight-hundredths feet intersect line 2–3 of said Monarch Lode claim at north thirty-four degrees and twenty-eight minutes west two hundred and thirty-one and eighty-eight-hundredths feet from corner No. 2; six hundred and twenty-three and forty-one-hundredths feet intersect line 4–1 of said survey No. 8822; eight hundred and seventy-four and seventy-six-hundredths feet intersect line 1–2 of said Monarch Lode claim, at north

fifty-five degrees and thirty-two minutes east two hundred and sixteen and ninety-one-hundredths feet from corner No. 2; nine hundred and eighty-three and twenty-three-hundredths feet intersect line 2–3 of said Hallett Lode claim; nine hundred and ninety-five and sixteen-hundredths feet intersect line 4–1 of said survey No. 8088 at north thirty-six degrees and forty-five minutes east two hundred and fifty and seventy-six-hundredths feet from corner No. 4; one thousand one hundred and fifty-five and four-tenths feet intersect lines 4–1 of said Hallett and Hamburg Lode claims; one thousand two hundred and forty-two and twenty-eight-hundredths feet intersect line 2–3 of said survey No. 8178 at north seven degrees and forty minutes east one hundred and forty-eight and nineteen-hundredths feet from corner No. 2; one thousand four hundred and fifty-five and sixty-nine-hundredths feet intersect line 2–3 of said Hamburg Lode claim; one thousand four hundred and fifty-eight and six-tenths feet to corner No. 3, from which corner No. 1 of said Victor Consolidated Lode claim bears south fifty-four degrees and one minute east one hundred and seventy-nine and thirty-two-hundredths feet distant.

119 Thence, third course, south fifteen minutes east five and ninety-five-hundredths feet intersect line 1–2 of said survey No. 8178 at north sixty-seven degrees forty minutes and thirty seconds east two hundred and forty-nine and nine-tenths feet from corner No. 2; one hundred and fifty-four and twenty-two-hundredths feet intersect line 2–3 of survey No. 8787, the Molican Lode claim; two hundred and ninety-eight and fifty-one-hundredths feet to corner No. 4 situate on line 3–4 of said survey No. 7475.

Thence, fourth course, north seventy-seven degrees and forty-four minutes west fifty-five and twenty-two-hundredths feet intersect line 2–3 of said Hamburg Lode claim; two hundred and seventy-seven and six-tenths feet intersect line 2–3 of said survey No. 8787; three hundred and fifty-five and forty-nine-hundredths feet intersect line 4–1 of said Hamburg and Hallett Lode claims; five hundred and twenty-seven and sixty-four-hundredths feet intersect line 2–3 of said Hallett Lode claim; eight hundred and two and sixty-three-hundredths feet intersect line 4–1 of said survey No. 8822; nine hundred and twenty-six and twelve-hundredths feet intersect line 3–4 of survey No. 7931, the Nellie V. Lode claim at south thirteen degrees and twenty minutes west two hundred and two and thirty-four-hundredths feet from corner No. 3; one thousand one hundred and fifteen and forty-five-hundredths feet intersect line 2–3 of said survey No. 8822; one thousand one hundred and fifty-eight and sixty-nine-hundredths feet intersect line 4–1 of said survey No. 8815 at south twenty-five degrees and forty-five minutes west twenty-six and one-tenth feet from corner No. 4; one thousand two hundred and thirteen and two-tenths feet intersect line 1–2 of said survey No. 7931 at

120 south thirteen degrees and twenty-two minutes west one hundred and thirty-seven and thirty-three-hundredths feet from corner No. 2; one thousand four hundred and twenty-eight and sixty-six-hundredths feet intersect line 41 of said survey No. 8617; one thousand four hundred and fifty-eight feet to corner No. 1 the

place of beginning; the survey of the lode as above described extending one thousand four hundred and fifty-eight feet in length along said Victor Consolidated No. 2 vein or lode. Expressly excepting and excluding from these presents all that portion of the ground, hereinbefore described, embraced in said mining claims or surveys Nos. 7475, 7931, 7968, 8088, 8178, 8617, 8787, 8815, 8822; the Monarch and Mammoth Pearl Lode claims, survey No. 7913 Am., the Hallett and Hamburg Lode claims, survey No. 8768, and that portion of said Victor Consolidated No. 2 Lode claim relinquished to the Ithica Tunnel site, described as follows: Beginning at a point on line 4–1 of said Victor Consolidated No. 2 Lode claim north seventy-seven degrees and forty-four minutes west five hundred and thirty-two and two-tenths feet from corner No. 4; thence north four degrees and forty-five minutes east nine and eight-tenths feet; thence north four degrees and fifteen minutes west twenty-five and seventy-five-hundredths feet; thence north twenty degrees east thirty-two and one-tenth feet; thence north seventy degrees west ten feet; thence south twenty degrees west fifty-nine feet; thence south forty-nine degrees and forty-three minutes east nineteen and thirty-five-hundredths feet to a point on line 4–1 of said Victor Consolidated No. 2 Lode claim; thence south seventy-seven degrees
121 and forty-four minutes east five feet to the place of beginning; and also all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of said excluded ground, the granted premises in said lot No. 8747 containing two acres and two hundred and seventy-nine-thousandths of an acre of land, more or less.

Now know ye, that there *is* therefore hereby granted by the United States unto the said The Calhoun Gold Mining Company and to its successors and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said Victor Consolidated and Victor Consolidated No. 2 veins, lodes or ledges, and of all other veins, lodes and ledges, throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises, in said lot No. 8747 extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises: Provided, that the right of possession to such outside parts of said veins, lodes, or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said lot No. 8747 so continued in their own direction that such plane will intersect such exterior parts of said veins, lodes or ledges; and provided further, that nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

122 To have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said grantee above named, and to its successors and assigns forever; subject, neverthe-

less, to the above-mentioned and to the following conditions and stipulations:

First. That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode, or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode, or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress, the legislature of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

123 In testimony whereof I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the eighth day of January, in the year of our Lord one thou-
[L. S.] sand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

By the President:

GROVER CLEVELAND,
By M. McKEAN, *Secretary.*
L. Q. C. LAMAR,
Recorder of the General Land Office.

Endorsed: "Exhibit D." Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

N.
A. B. B. 4–219. H. G. P.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 30, 1898.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy, from pages 1 to 11, inclusive, of application for patent, proof of publication, application to
124 purchase, and receiver's receipt *in re* mineral entry No. 975, the Victor Consolidated and Victor Consolidated No. 2 Lode claims, Pueblo, Colorado, land district, is a true and literal exemplification of said papers on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

BINGER HERMANN,
[SEAL.] *Commissioner of the General Land Office.*

12,499b–1 m.

Endorsed: Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

Application for Patent.

STATE OF COLORADO, }
County of ——, } *ss:*

EX. E.

Application for patent for the Victor Consolidated and Victor Consolidated No. 2 mining claims.

To the register and receiver of the U. S. land office at Pueblo, Colo.:

R. Huy, whose P. O. address is Cripple Creek, Colo., being duly sworn according to law, deposes and says that in virtue of a compliance with the mining rules, regulations, and customs he is the duly authorized agent of the Victor Consolidated Gold Mining and Milling Company, applicant for patent herein, having become
125 the owner of and being in the actual, quiet, and undisturbed possession of 1,500 linear feet of the Victor Consolidated lode and 1,458.6 linear feet of the Victor Consolidated No. 2 vein, lode, or deposit, bearing gold and silver, together with surface ground 300 feet in width for the convenient working thereof, as allowed by local rules and customs of miners, said mineral claim, vein, lode, or deposit and surface ground being situate in Cripple Creek mining district, county of El Paso, and State of Colorado, and being more particularly set forth and described in the official field-notes of survey thereof hereto attached, dated April 21st, A. D. 1894, and in the official plat of said survey, now posted conspicuously upon said mining claim or premises, a copy of which is filed herewith. Deponent further states that the facts relative to the right of possession of the Victor Consolidated Gold Mining and Milling Co. to said mining claim, vein, lode, or deposit and surface ground so surveyed and platted are substantially as follows, to wit, by purchase, which will more fully appear by reference to the copy of the original record of location and the abstract of title herewith filed, the value of the labor done and improvements made upon said Victor Consolidated and Victor Consolidated No. 2 claims by claimants being equal to the sum of five hundred dollars. Said improvements consist of the discovery cut of the Victor Consolidated, a shaft in same, an open cut and tunnel, discovery shaft of Victor Consolidated No. 2 lode, and a drift from bottom of same, but expressly excepting and excluding from this application area in conflict with surs. Nos.

7475, 7913, 7931, 7968, 8088, and 8178, in consideration of which facts and in conformity with the provisions of chapter six of title thirty-two of the Revised Statutes of the United States, ap-
126 plication is hereby made for and in behalf of said Victor Consolidated Gold Mining and Milling Company for a patent from the United States for the said Victor Consolidated and Victor Consolidated No. 2 mining claims, veins, lodes, deposits, and the surface ground so officially surveyed and platted.

R. HUY,
Agent for the Victor Consolidated Gold Mining and Milling Co.

Subscribed and sworn to before me this 21 day of April, A. D. 1894, and I hereby certify that I consider the above deponent a credible and reliable person, and the foregoing affidavit, to which was attached the field-notes of survey of the Victor Consolidated and Victor Consolidated No. 2 mining claims, was read and examined by him before his signature was affixed thereto and the oath made by him.

EDWARD P. ARTHUR,
[SEAL.] *Notary Public.*

My commission expires Feb. 8th, 1898.

Endorsed: No. 738. Application for patent and field-notes of survey. Victor Consolidated and Victor Consolidated No. 2 mining claims. The Victor Consolidated Gold Mining & Milling Co., by W. H. Blackburn, agent, applicant. U. S. L. O., Pueblo, Colo. Received, 9 o'clock a. m., $10.00, Apr. 23, 1894, from A. H. Weber, [mail]* counter.

Proof of Publication.

STATE OF COLORADO, }
County of El Paso, } ss:

A. A. McKnight, being first duly sworn, deposes and says that he is the business m'g'r of the Weekly Journal, a newspaper published at Cripple Creek, in El Paso county, in the State of Colorado; that the notice of the application for a patent for the Victor Con-
127 solidated and Victor Consolidated No. 2 mining claims, of which a copy is hereto attached, was first published in said newspaper in its issue dated the 29th of April, 1894, and was published in each ([daily or]* weekly) issue of said newspaper for ([sixty consecutive days]* or ten consecutive weeks thereafter) the full period of sixty days, the last publication thereof being in the issue dated the 1st of July, 1894.

A. A. McKNIGHT.

[* Words enclosed in brackets erased in copy.]

Subscribed and sworn to before me this eleventh of February, A. D. 1896.

My commission expires Jan. 7, 1899.

CORELON B. HICKMAN,

[SEAL.] *Notary Public.* [SEAL.]

Endorsed: Proof of publication. U. S. L. O., Pueblo, Colo. Received, — o'clock — m., Feb. 15, 1898, from —— ——, mail counter.

Ex. E 2.

Mining Application No. 738.

(Survey No. 8747.)

U. S. LAND OFFICE, PUEBLO, COLO., *April* 23, 1894.

Notice is hereby given that the Victor Consolidated Gold Mining and Milling Company, by its agent, R. Huy, whose post-office is P. O. box 333, Cripple Creek, has made application for a patent for 1,500 linear feet on the Victor Consolidated lode and 1,458.6 linear feet on the Victor Consolidated No. 2 lode, bearing gold and silver, with surface ground 300 feet in width, situate in Cripple Creek mining district, El Paso county, State of Colorado, and described in the plat and field-notes on file in this office as follows, viz: Victor
128 Consolidated lode beginning at cor. No. 1, whence the S. ¼ cor. of sec. 29, twp. 15 S., R. 69 W., of the 6th P. M., bears S. 41 deg. 44 min. E. 2,060.3 ft.; thence N. 80 deg. 52 min. W. 1,502.2 ft. to cor. No. 2; thence S. 72 deg. 44 min. W. 302.1 ft. to cor. No. 3; thence S. 10 deg. 22 min. E. 1,496.6 ft. to cor. No. 4; thence N. 72 deg. 44 min. E. 262.22 ft. to place of beginning; Victor Consolidated No. 2 lode beginning at cor. No. 1, whence the S. ¼ cor. of sec. 28, twp. 15 S., R. 69 W., of the 6th P. M., bears S. 60 deg. 39 min. E. 3,372.9 ft.; thence N. 0 deg. 15 min. W. 301.24 ft. to cor. No. 2; thence S. 77 deg. 38 min. E. 1,458.6 ft. to cor. No. 3; thence S. 0 deg. 15 min. E. 298.51 ft. to corner No. 4; thence N. 77 deg. 44 min. W. 1,458 ft. to cor. No. 1, the place of beginning, containing 19.443 acres, expressly excepting and excluding all conflict with surveys Nos. 7475, 7913, 7931, 7968, 8088, 8617, and 8178, without waiver of lode-claim rights, net area 5.835 acres, and forming a portion of the W. ½ of sec. 29 and the S. E. ¼ of sec. 30, twp. 15 S., R. 69 W., of the 6th P. M., said location being recorded in vol. 8, pages 168 and 191, of the Records of El Paso County, Colorado.

RAYMOND MILLER, *Register.*

First publication, April 29, 1894; last publication, July 1, 1894.

Ex. F.

Application to Purchase.

To the register and receiver United States land office at Pueblo, Colorado:

The undersigned, claimant under the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, and
129 legislation supplemental thereto, hereby applies to purchase that mining claim known as the Victor Consolidated lode and the Victor Consolidated No. 2 lode, situate in sections 29 & 30, in township No. 15 S., of range No. 69 W., 6th P. meridian, designated as lot No. 8747, said lot No. 8747 extending 1,496.9 feet in length along said Victor Consolidated lode and 1,458 feet in length along said Victor Consolidated No. 2 lode vein or lode, but expressly excepting and excluding from this application all that portion of the ground embraced in mining claims or surveys designated as lots Nos. 7475, Dead Pine lode; 7913, Monarch and Mammoth Pearl lodes; 7968, Coriolanus lode; 8178, Apex lode; 7931, Nellie V. lode; 8088, Big Theatre lode; 8787, Mohican lode; 8822, X-10-U-8 lode; 8617, Summit lode; 8768, Hallett and Hamburg lodes, and also that portion of 8815, Pearl Macy lode, described as follows: Beginning at cor. No. 1, sur. No. 8747, Victor Consolidated No. 2 lode, thence N. 0 15′ W. 9.71 ft.; thence N. 25 45′ E. 50.97 ft.; thence S. 64 40′ E. 240.32 ft.; thence S. 13 22′ W. 4.70 ft.; thence N. 77 44′ W. 243.79 ft. to place of beginning, containing 0.182 acres, and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground, said lode mining claim embracing 3.460 acres [and said mill-site claim — acres],* in the Cripple Creek mining district, in the county of El Paso and State of Colorado, as shown by the survey thereof, and hereby agree to pay therefor twenty dollars, being the legal price thereof.

A. H. WEBER, *Agent.*
THE CALHOUN GOLD MINING CO.,
By A. H. WEBER, *V. President.*

Dated Sept. 1, 1896.

M. A. 738.
M. E. 975.

I, Raymond Miller, register of the land office at Pueblo,
130 Colorado, do hereby certify that the aforesaid mining claim or lot No. 8747, as applied for above, is subject to entry by the above-named applicant, the area of said lode mining claim being 3.460 acres [and of said mill-site claim — acres]* and the legal price thereof twenty dollars.

RAYMOND MILLER, *Register.*

September 3, 1896.

[* Words enclosed in brackets erased in copy.]

Endorsed: Application to purchase. M. E. No. 975. Victor Consolidated *et al.* Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

Ex. G.

(4–145.)

Receiver's Receipt.

(Duplicate to be given the purchaser.)

Mineral entry No. 975, lot No. 8747.

UNITED STATES LAND OFFICE AT
PUEBLO, COLO., *September* 3, 1896.

Patent to contain reservation according to proviso to the act of August 30, 1890.

Received from the Calhoun Gold Mining Company the sum of twenty dollars, the same being payment in full for the area embraced in that mining claim known as the Victor Consolidated and Victor Consolidated No. 2 lodes, forming a part of sections 29 and 30, in township 15 south, of range No. 69 west, of 6 principal meridian, designated as lot No. 8747, said lot No. 8747 extending 1,496.9 feet in length along said Victor Consolidated lode and 1,458 feet in length along said
131 Victor Consolidated No. 2 vein or lode, expressly excepting and excluding from this sale and entry all that portion of the ground embraced in mining claim or survey designated as lots No. 7475, Dead Pine lode; 7913, Monarch and Mammoth Pearl lodes; 7968, Coriolanus lode; 8178, Apex lode; 7931, Nellie V. lode; 8088, Big Theatre lode; 8787, Mohican lode; 8822, X-10-U-8 lode; 8617, Summit lode; 8768, Hallett and Hamburg lodes; also that portion of 8815, Pearl Macy lode, described as follows: Beginning at cor. No. 1, sur. 8747, Victor Consolidated No. 2 lode, thence N. 0 15′ W. 9.71 ft.; thence N. 25 45′ E. 50.97 ft.; thence S. 64 40′ E. 240.32 ft.; thence S. 13 22′ W. 4.70 ft.; thence N. 77 44′ W. 243.79 ft. to place of beginning, containing .182 of an acre, and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground, said lode mining claim as entered embracing 3,460 acres [and said mill-site claim — acres],* in the Cripple Creek mining district, in the county of El Paso and State of Colorado, as shown by the survey thereof.

JOHN J. KEY, *Receiver.*

$20.00.
6–375.

Endorsed: Ex's E, F, & G. Receiver's receipt in mineral entry No. 975, in case of the mining claim known as the Victor Consolidated and Victor Consolidated No. 2 lodes, Cripple Creek mining

[* Words enclosed in brackets erased in copy.]

district, lot No. 8747. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

132 "Copy."

Location Certificate.

STATE OF COLORADO, } ss:
County of El Paso, }

Know all men by these presents that Clarence Stanley, the undersigned, has this 24th day of October, 1893, located and claimed and by these presents does locate and claim, by right of discovery and location, in compliance with the mining acts of Congress approved May 10, 1872, and all subsequent acts, and with local customs, laws, and regulations, 1,500 linear feet and horizontal measurement on the Victor Consolidated lode, vein, ledge, or deposit along the vein thereof, with all its dips, angles, and variations, as allowed by law, together with 150 feet on the easterly side and 150 feet on the westerly side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges, or deposits and surface ground within the lines of said claim 125 feet running S. 11 30′ from center of discovery cut and 1,375 feet running N. 11 30′ W. from center of discovery cut, said discovery being situate upon said lode, vein, ledge, or deposit and within the lines of said claim, in Cripple Creek mining district, county of El Paso and State of Colorado, described by metes and bounds as follows, to wit: Beginning at corner No. 1, whence cor. No. 1 of U. S. sur. No. 8178, Apex lode, bears N. 39 05′ W. 158.9 feet, the ¼ sec. cor. bet. sections 29 & 32, tp. 15 S., R. 69 W., of the 6th principal meridian, bears S. 40 19′ E. 2,378.4 ft.; thence N. 11 30′ W. 750 feet to east side center stake and 1,500 ft. to N. E. cor. No. 2, a post; thence S. 71 50′ W. 302.4 ft. to corner No. 3, a post; thence S. 11 30′
133 E. 750 ft. to west side center post and 1,500 feet to corner No. 4, a post, which is also the north center side stake of the Mohican lode; thence N. 71 50′ E. along the north side line of the Mohican lode 302.4 ft. to cor. No. 1, the place of beginning. Variation 13 45′ E. From the center of the north end line cor. No. 4, U. S. survey No. 8178, bears N. 71 50′ E. 10 ft. dist. Bull mountain bears N. 14 E.

CLARENCE STANLEY. [SEAL.]

Said lode was discovered on the 24th day of October, A. D. 1893.
Attest: THOS. L. DARBY.

Date of location, October 24th, A. D. 1893.
Date of certificate, Oct. 28th, A. D. 1893.

Endorsed: "Ex. H." Location certificate on the Victor Consolidated lode. Mining claim of —— ——, in —— mining district, —— county, State of Colorado.

STATE OF COLORADO, } ss:
County of El Paso, }

I hereby certify that this location certificate was filed for record in my office at 10.05 o'clock a. m., Nov. 2d, 1893, and is duly recorded in Book 8, at page 168.

F. W. HOWBERT, *Recorder,*
By ——— ———, *Deputy.*

Fees, $—.

Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898.

EDGAR HOWBERT, *Clerk.*
By E. K. GAYLORD, *Deputy.*

STATE OF COLORADO, } ss:
County of El Paso, }

134 I, W. T. Liggett, county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true, and correct copy of location certificate of the Victor Consolidated lode. Filed for record at 10.05 a. m., Nov. 2, 1893, and duly recorded in Book 8, at page 168, of the records of El Paso county, Colorado; made from the original [paper]* record.

In testimony whereof I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this 23rd day of May, A. D. 1898.

[SEAL.]

W. T. LIGGETT,
County Clerk and Recorder.
By MOLLIE GREGORY, *Deputy.*

Notice.

The Calhoun Gold Mining Company, owner of the Ithica Tunnel site, claims fifteen hundred feet on the Ithica Tunnel lode No. 1, being seven hundred and fifty feet in a southerly direction, on the corner of said lode from the centre of the Ithica tunnel, and seven hundred and fifty feet in a northerly direction on the corner of said vein from the centre of said tunnel at its intersection with said vein, together with one hundred and fifty feet on each side of the centre of said vein at the surface. Said vein was discovered in said tunnel September 19th, 1895, at a point in said tunnel 138 feet from
135 the mouth of the tunnel, and is claimed, with all the dips, spurs, and angles, by virtue of the location of and diligent prosecution of work in said tunnel and the discovery of the vein therein. This notice is placed immediately over the point of discovery in said tunnel, as near as may be, allowing for the apparent dip of said vein.

THE CALHOUN GOLD MINING COMPANY,
By [BEN. G. BROOKS,]* *Manager.*

[October,]* 1895.

Cripple Creek mining district, Dec. 15th, '95.

[* Word enclosed in brackets erased in copy.]

Endorsed: Tunnel. "Ex. I." Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

STATE OF COLORADO, } ss:
County of El Paso, }

I hereby certify that this instrument was filed for record in my office at 10.58 o'clock a. m., Dec. 26, 1895, and is duly recorded in Book 228, page 62.

F. W. HOWBERT, *Recorder.*

Fee, 50c.

W. H. BLACKBURN,
1767 *Vine St., Denver.*

Location Certificate of Tunnel

To all whom these presents may concern:

Know ye, that I, A. H. Weber, a citizen of the United States, of Denver, county of Arapahoe, State of Colorado, do hereby declare and publish as a legal notice to all the world, that I have a valid right to the occupancy, possession and enjoyment of the Ithica tunnel and tunnel site, located August 19th, 1895, A. D., for the discovery of mines and the development of lodes, and situate in
136 Cripple Creek mining district, El Paso county, State of Colorado, described as follows, to wit:

Mouth of tunnel situate on the south slope of the ridge connecting Battle mountain with Squaw mountain in the southwest quarter of section 29 T. 15 S. R. 69 W. of the 6th P. M. and from the center of the mouth of the tunnel the S. ¼ cor. of sec. 29 T. 15 S. R. 69 W. bears S. 48 34 E. 2,721.5 cor. No. 4 of sur. No. 8747 Victor Consolidated No. 2 lode bears S. 74 17′ E. 545.5 cor. No. 3 of sur. No. 7931 Nellie V. lode bears N. 53 31′ W. 415.6.

Size of tunnel 8 ft. wide by 7 ft. high in the clear.

Course of tunnel from its mouth N. 10 W. 35 ft. to a stake and running thence N. 20 E. 2,965 ft. to the north end of said tunnel at which point is set a substantial stake, being the end stake and marked 30, and between the tunnel mouth and end stake the center line of the tunnel is marked by substantial stakes set every 100 ft. and numbered consecutively 0, 035, 1, 2, 3, 4, 5, and so on to 30 and the line is cleared of trees and brush for its entire distance.

From the north end stake numbered 30 the smokestack of the Elkton mine bears S. 89 25′ W. The smokestack of the Moose mine bears N. 52 39′ W. The southeast corner of the Bertha B. lode bears N. 39 54′ W. and a mountain peak bears N. 72 38′ W.

And I claim for line of tunnel 750 ft. on each side of the center of the bore or course of the tunnel, and the right to all lodes which may be discovered in the due prosecution of said tunnel within 750 ft. on each side of the center of said line.

And I also claim a square track of land 125 ft. on each side of the mouth of the tunnel and extending 250 ft. immediately below the

mouth of the tunnel for *for* dumping purposes. Together
137 with all — singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and all rights granted to the locator as tunnel rights under the terms of section 2323 of the Revised Statutes of the United States.

A. H. WEBER. [SEAL.]

STATE OF COLORADO, }
County of Arapahoe, } ss:

Before me, the subscriber, a notary public in and for said county, personally appeared A. H. Weber, to me personally known to be the same person described in and who executed the within declaration of occupation, and acknowledged that he signed, sealed, and published the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and notarial seal this 10th day of August, A. D. 1895.

My commission expires M'ch 21, 1898.

PRESTON H. BARKER,
[SEAL.] *Notary Public.*

Endorsed: Ex. J. Location certificate of Ithica tunnel and tunnel site. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

STATE OF COLORADO, }
County of El Paso, } ss:

I hereby certify that this instrument was filed for record in my office at 9.05 o'clock a. m. Aug. 20, 1895, and is duly recorded in Book 214, page 324.

F. W. HOWBERT, *Recorder.*

75c. pd.

138 *Additional and Amended Location Certificate.*

STATE OF COLORADO, }
County of El Paso, } ss:

Know all men by these presents that the Calhoun Gold Mining Company has this day amended, located, and claimed, and by these presents does amend, locate, and claim, by right of the Ithica Tunnel site, discovery and location of the vein, and this additional and amended location certificate, in compliance with the mining acts of Congress approved May 10th, 1872, and all subsequent acts, and with section 2409 of the General Statutes of Colorado, and with local customs, laws, and regulations, fifteen hundred (1,500) linear feet, horizontal measurement, on the Ithica Tunnel No. 2 lode, along the vein thereof, with all its dips, angles, and variations, together with the surface ground one hundred and fifty (150) feet on each side of the middle of said vein; said lode so located and claimed is more particularly described as follows, to wit:

22485

Beginning at a point in the Ithica tunnel one hundred sixty-five (165) feet from the face of said tunnel and extending from said point seven hundred fifty (750) feet southeasterly and seven hundred fifty (750) feet northwesterly. The bearing of said lode is about north 35 30′ west. The surface ground claimed with said lode is described as follows, to wit:

Beginning at corner No. 1,
Thence N. 54 30′ E. 300 feet;
Thence N. 35 30′ W. 1,500 feet;
Thence S. 54 30′ W. 300 feet;
Thence S. 35 30′ E. 1,500 feet;

to corner No. 1, place of beginning, variation 13 30′ east, said
139 point of discovery in said tunnel being at the centre and within the lines of said claim and situate on the southern slope of Battle mountain, in the Cripple Creek mining district, county of El Paso, State of Colorado.

This being the same lode originally discovered in said tunnel on the 27th day of Sept., 1895, and recorded in Book 228, page 62, in the office of the recorder of said county. This further additional and amended location certificate is made without waiver of any previously acquired rights, but for the purpose of correcting any errors in the original description, location, or record, and of taking in and acquiring all forfeited or abandoned overlapping ground, and of taking in any part of any overlapping claim which has been abandoned, and of securing all the benefit of sec. 2409 of the General Statutes of Colorado.

Date of additional and amended location certificate, the 18th day of June, A. D. 1897.

THE CALHOUN GOLD MINING COMPANY,
[SEAL.] By A. H. WEBER, *Vice-President.*

Attest: JAMES QUINN, JR., *Secretary.*

Endorsed: Compared. "Ex. J." 41397. Additional & amended location certificate, Ithica Tunnel No. 2 lode, by Calhoun Gold Mining Co. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy. State of Colorado, county of El Paso, *ss:* I hereby certify that this instrument was filed for record in my office at 3.25 o'clock p. m., June 22, 1897, and is duly recorded in Book 264, page 33 *et seq.* J. W. Bates, recorder. .75.

140 *Location Certificate.*

(Lodes discovered in a tunnel.)

STATE OF COLORADO, } *ss:*
County of El Paso, }

Know all men by these presents that we, the Calhoun Gold Mining Co., owner of the Ithica Tunnel site, the undersigned, have this 20th day of December, A. D. 1895, located and claimed, and by these

presents do locate and claim, and by right of discovery and location, in compliance with the mining acts of Congress approved May 10th, 1872, and all subsequent acts and with local customs, laws, and regulations, 1,500 linear feet and horizontal measurement on the Ithica Tunnel No. 3 lode, vein, ledge, or deposit along the vein thereof, with all its dips, angles, and variations as allowed by law, together with the amount of surface ground necessary for working the same and allowed by law, 750 feet of said lode so located lying and being southeasterly of the discovery on said lode and 750 feet being northwesterly of said discovery, said lode, vein, ledge, or deposit lying and being in the Cripple Creek mining district, county of El Paso and State of Colorado, and being more particularly described as follows, to wit:

Beginning at a point in the Ithica tunnel 356 feet from the mouth or entrance of said tunnel and extending from said point 750 feet northwesterly and 750 feet southeasterly.

THE CALHOUN GOLD M'G CO. [SEAL.]

Said lode was discovered on the 20th day of December, A. D. 1895.

Date of location, December 20th, A. D. 1895.

Date of certificate, —— —, A. D. 189–.

141 Endorsed: "Ex. K." Location certificate, lodes discovered in a tunnel. In the —— mining tunnel of ——, in —— mining district, —— county, State of Colorado.

STATE OF COLORADO, } ss:
County of El Paso, }

I hereby certify that this location certificate was filed for record in my office at 10.57 o'clock a. m., Dec. 26, 1895, and is duly recorded in Book 228, at page 61.

F. W. HOWBERT, *Recorder.*

Fees, $.75.

Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16th, 1898.

EDGAR HOWBERT, *Clerk,*
By E. K. GAYLORD, *Deputy.*

Ret., 50c.

The Ithica Tunnel Lode No. 4 Mining Claim.

STATE OF COLORADO, } ss:
County of El Paso, }

Know all men by these presents that the Calhoun Gold Mining Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, owner of the Ithica Tunnel site, has located and claimed, and does hereby claim, 1,500 linear feet and horizontal measurement on the Ithica Tunnel Lode No. 4, being 750 feet northwesterly and 750 feet southeasterly on said vein, lode

ledge, or deposit from its intersection with said tunnel, together with — feet on each side of the apex of said vein at the surface. The said vein, lode, ledge, or deposit was discovered in said tunnel on the 20th day of November, A. D. 1895, at a point 250 feet from the face or mouth of said tunnel, and is claimed with all the dips,
142 spurs, and angles by virtue of the location of said tunnel, diligent work, and the discovery of said vein therein.

Said tunnel was located on the 19th day of August, A. D. 1895, and the face thereof is situate on the southern slope of Battle mountain, in Cripple Creek mining district, El Paso county, Colorado.

Date of this certificate, this 21st day of December, A. D. 1896.

[SEAL.] THE CALHOUN GOLD MINING COMPANY,
By A. H. WEBER, *Vice-President.*

Attest: JAMES QUINN, JR., *Secretary.*

Endorsed: Compared. "Ex. L." 31472. Location certificate, Ithica Tunnel Lode No. 4, by Calhoun Gold Mining Co. State of Colorado, county of El Paso, *ss:* I hereby certify that this instrument was filed for record in my office at 8.10 a. m., Dec. 22, 1896, and is duly recorded in Book 258, page 103. J. W. Bates, recorder. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

143 *The Ithica Tunnel Lode No. 5 Mining Claim.*

STATE OF COLORADO, *County of El Paso,* } *ss:*

Know all men by these presents that the Calhoun Gold Mining Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, owner of the Ithica Tunnel site, has located and claimed, and does hereby claim, 1,500 linear feet and horizontal measurement on the Ithica Tunnel Lode No. 5, being 750 feet northwesterly and 750 feet southeasterly on said vein, lode, ledge, or deposit from its intersection with said tunnel, together with 150 feet on each side of the apex of said vein at the surface. The said vein, lode, ledge, or deposit was discovered in said tunnel on the 4th day of August, A. D. 1896, at a point 581 feet from the face or mouth of said tunnel, and is claimed with all the dips, spurs, and angles by virtue of the location of said tunnel, *g*iligent work, and the discovery of said vein therein.

Said tunnel was located on the 19th day of August, A. D. 1895, and the face thereof is situate on the southern slope of Battle mountain, in Cripple Creek mining district, El Paso county, Colorado.

Date of this certificate, this 21st day of December, A. D. 1896.

THE CALHOUN GOLD MINING COMPANY,
By A. H. WEBER, *Vice-President.*

Attest:

[SEAL.] JAMES QUINN, JR., *Secretary.*

Endorsed: Compared. "Ex. M." 31473. Location certificate, Ithica Tunnel Lode No. 5, by Calhoun Gold Mining Co. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E K. Gaylord, deputy. State of Colorado, county of El Paso, *ss:* I hereby certify that this instrument was filed for record in my office at 8.11 o'clock a. m., Dec. 22, 1896, and is duly recorded in Book 258, page 103. J. W. Bates, recorder. .50.

144 *The Ithica Tunnel Lode No. 6 Mining Claim.*

STATE OF COLORADO, }
County of El Paso, } *ss:*

Know all men by these presents that the Calhoun Gold Mining Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, owner of the Ithica Tunnel site, has located and claimed and does hereby claim 1,500 linear feet and horizontal measurement on the Ithica Tunnel lode No. 6, being 750 feet northwesterly and 750 feet southeasterly on said vein, lode, ledge, or deposit from its intersection with said tunnel, together with 150 feet on each side of the apex of said vein at the surface. The said vein, lode, ledge, or deposit was discovered in said tunnel on the 16th day of August, A. D. 1896, at a point 643 feet from the face or mouth of said tunnel, and is claimed with all the dips, spurs, and angles, by virtue of the location of said tunnel, diligent work, and the discovery of said vein therein.

Said tunnel was located on the 19th day of August, A. D. 1895, and the face thereof is situate on the southern slope of Battle mountain, in Cripple Creek mining district, El Paso county, Colorado.

Date of this certificate this 21st day of December, A. D. 1896.

THE CALHOUN GOLD MINING COMPANY,
By A. H. WEBER, *Vice-President.*

Attest.
[SEAL.] JAMES QUINN, JR., *Secretary.*

Endorsed: "Ex. N." Compared. 31471. Location certificate, Ithica Tunnel lode No. 6, by Calhoun Gold Mining Co. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy. State of Colorado, county of El Paso, *ss:* I hereby certify that this instrument was filed for record in my office at 8.12 o'clock a. m., Dec. 22nd, 1896, and is duly recorded in Book 258, page 104. J. W. Bates, recorder. .50.

145 *The Ithica Tunnel Lode No. 7 Mining Claim.*

STATE OF COLORADO, }
County of El Paso, } *ss:*

Know all men by these presents that the Calhoun Gold Mining Company, a corporation organized and existing under and by virtue

of the laws of the State of Colorado, owner of the Ithica Tunnel site, has located and claimed and does hereby claim 1,500 linear feet and horizontal measurement on the Ithica Tunnel lode No. 7, being 750 feet northwesterly and 750 feet southeasterly on said vein, lode, ledge, or deposit from its intersection with said tunnel, together with 150 feet on each side of the apex of said vein at the surface. The said vein, lode, ledge, or deposit was discovered in said tunnel on the 22nd day of August, A. D. 1896, at a point 681 feet from the face or mouth of said tunnel, and is claimed with all the dips, spurs, and angles, by virtue of the location of said tunnel, diligent work, and the discovery of said vein therein.

Said tunnel was located on the 19th day of August, A. D. 1895, and the face thereof is situate on the southern slope of Battle mountain, in Cripple Creek mining district, El Paso county, Colorado.

Date of this certificate this 21st day of December, A. D. 1896.

THE CALHOUN GOLD MINING COMPANY,
By A. H. WEBER, *Vice-President.*

Attest:
[SEAL.] JAMES QUINN, JR., *Secretary.*

Endorsed: "Ex. O." Compared. 31475. Location certificate, Ithica Tunnel lode No. 5, by Calhoun Gold Mining Co. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy. State of Colorado, county of El Paso, *ss:* I hereby certify that this instrument was filed for record in my office at 8.13 o'clock a. m., Dec. 22, 1896, and is duly recorded in Book 258, page 104. J. W. Bates, recorder. .50.

146 *The Ithica Tunnel Lode No. 8 Mining Claim.*

STATE OF COLORADO, }
County of El Paso, } *ss:*

Know all men by these presents that the Calhoun Gold Mining Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, owner of the Ithica Tunnel site, has located and claimed, and does hereby claim, 1,500 linear feet and horizontal measurement on the Ithica Tunnel lode No. 8, being 750 feet northwesterly and 750 feet southeasterly on said vein, lode, ledge, or deposit from its intersection with said tunnel, together with — feet on each side of the apex of said vein at the surface. The said vein, lode, ledge, or deposit was discovered in said tunnel on the 16th day of October, A. D. 1896, at a point 927 feet from the face or mouth of said tunnel, and is claimed with all the dips, spurs, and angles, by virtue of the location of said tunnel, diligent work, and the discovery of said vein therein.

Said tunnel was located on the 19th day of August, A. D. 1895,

and the face thereof is situate on the southern slope of Battle mountain, in Cripple Creek mining district, El Paso county, Colorado.

Date of this certificate this 21st day of December, A. D. 1896.

THE CALHOUN GOLD MINING COMPANY,
By A. H. WEBER, *Vice-President.*

Attest:
[SEAL.] JAMES QUINN, JR., *Secretary.*

Endorsed: "Ex. P." Compared. 31476. Location certificate, Ithica Tunnel lode No. 8, by Calhoun Gold Mining Co. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy. State of Colorado, county of El Paso, *ss:* I hereby certify that this instrument was filed for record in my office at 8.14 o'clock a. m., Dec. 22, 1896, and is duly recorded in Book 258, page 105. J. W. Bates, recorder. .50.

147 *The Ithica Tunnel Lode No. 9 Mining Claim.*

STATE OF COLORADO, }
County of El Paso, } *ss:*

Know all men by these presents that the Calhoun Gold Mining Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, owner of the Ithica Tunnel site, has located and claimed, and does hereby claim, 1,500 linear feet and horizontal measurement on the Ithica Tunnel lode No. 9, being 750 feet northwesterly and 750 feet southeasterly on said vein, lode, ledge, or deposit from its intersection with said tunnel, together with 150 feet on each side of the apex of said vein at the surface. The said vein, lode, ledge, or deposit was discovered in said tunnel on the 28th day of October, A. D. 1896, at a point 961 feet from the face or mouth of said tunnel, and is claimed with all the dips, spurs, and angles by virtue of the location of said tunnel, diligent work, and the discovery of said vein therein.

Said tunnel was located on the 19th day of August, A. D. 1895, and the face thereof is situate on the southern slope of Battle mountain, in Cripple Creek mining district, El Paso county, Colorado.

Date of this certificate this 21st day of December, A. D. 1896.

[SEAL.] THE CALHOUN GOLD MINING COMPANY,
By A. H. WEBER, *Vice-President.*

Attest: JAMES QUINN, JR., *Secretary.*

Endorsed: "Ex. Q." Compared. 31477. Location certificate, Ithica Tunnel lode No. 9, by Calhoun Gold Mining Co. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy. State of Colorado, county of El Paso, *ss:* I hereby certify that this

instrument was filed for record in my office at 8.15 o'clock a. m., Dec. 22, 1896, and is duly recorded in Book 258, page 105. J. W. Bates, recorder. .50.

148 The plat marked Exhibit "A" and referred to in the stipulation herein, dated March 24, 1898, which said plat was offered in evidence and has heretofore been filed, being too large to attach to this bill of exceptions, is, however, incorporated herein by reference and is separately transmitted.

And thereafter and on the same day the court did find—

That the matters and things stated in the complaint are true, and that the plaintiff is and at the commencement of this suit was the owner in fee of the Apex, Mammoth Pearl, and Monarch Lode mining claims in the complaint described, and was entitled to the sole and exclusive, peaceable and undisputed possession of each and every part thereof, including all veins, lodes, or ledges having their tops or apexes therein; but that defendant, without plaintiff's knowledge or consent, entered into and upon a portion of plaintiff's premises, below the surface thereof, and extended its excavations, the Ithica tunnel in the pleadings mentioned, about 900 feet therein; that in said tunnel defendant cut several veins of mineral-bearing rock in place, and took out and removed therefrom and converted to its own use a large quantity of ore belonging to plaintiff, being of the value of $400.00; that the defendant was at the commencement of this action further extending said excavation or tunnel into plaintiff's said premises and taking out and removing additional ore therefrom, and was threatening to continue said wrongful acts.

And did further find that at and prior to the commencement of this action defendant was the owner in fee of the Victor Consolidated Lode mining claim in the answer described, and that the apex of the vein thereof exposed in the discovery shaft is continuous throughout the length of said claim, and is a cross-vein
149 on the strike to plaintiff's Monarch and Mammoth Pearl and the veins thereof and the vein of the Apex claim; that the vein of the said Victor Consolidated claim was not known to exist prior to its discovery in said discovery shaft by defendant and its grantors.

That prior to the commencement of this action and on, to wit, the 19th day of August, 1895, the defendant located a tunnel site called the Ithica Tunnel site, under section 2323 of the Revised Statutes of the United States, and thereafter prosecuted work in said tunnel with great diligence until enjoined by order of this court, and that said tunnel has reached a depth of 1,365 feet from the face thereof; that the face of said tunnel at the date of its location was upon unappropriated public domain, and the line thereof crosses plaintiff's claims, and also the territory originally in conflict between them and defendant's Victor Consolidated claim; that the veins cut by said tunnel within the side lines of plaintiff's claims do not appear on the surface and were not known to exist prior to the location of said tunnel site; that the location of said Ithica Tunnel site was long subsequent to the location of each and every of plaintiff's said lode

claims, and was also subsequent to the issue of patent by the United States Government for plaintiff's said Apex Lode mining claims, and also subsequent to the issuance and delivery of the receiver's receipt and final entry in the United States Land Office of plaintiff's said Monarch and Mammoth Pearl Lode mining claims, but said tunnel was located prior to the issuance of patents for said Monarch and Mammoth Pearl claims; that the location of defendant's Victor Consolidated claim was subsequent to the location of each and every of plaintiff's said lode mining claims, and was also subsequent to the application for patent in the United States Land Office therefor and while said patent proceedings were pending.

150

And did further find that in the application to the United States Land Office for patent to defendant's said Victor Consolidated Lode claim, and also in the application to said land office to purchase the same, likewise in the receiver's receipt issued upon the final entry thereof, and from the grant contained in the United States patent issued thereto, all of the surface contained in each and every of plaintiff's said lode claims conflicting with the said Victor Consolidated Lode claim, together with all veins, lodes, or ledges having their tops or apexes in said conflicting surface, was expressly excluded and excepted, and that all of said surface so in conflict between the plaintiff's said mining claims and the said Victor Consolidated Lode mining claim of defendant, together with all of said veins, lodes, or ledges having their tops or apexes therein, was included in the grant and conveyed by the United States patents issued for plaintiff's said lode claims.

To which findings of law and of fact, save and except such facts as are expressly admitted in the pleadings and in the stipulation herein, and each and every thereof, the defendant, by its counsel, then and there duly excepted.

And the court did then order, adjudge, and decree that plaintiff is the owner in fee and is entitled to the exclusive, peaceable, and undisturbed possession of said premises, to wit, the said Apex Lode mining claim, patent survey No. 8178, and the said Monarch and Mammoth Pearl Lode mining claims, patent survey No. 7913, in Cripple Creek mining district, El Paso county, Colorado, together with all veins, lodes, or ledges having their tops or apexes therein, and including all that portion of the said Victor Consolidated vein within the side and end lines of the plaintiff's said claims extended downward vertically, and that plaintiff do have and recover of and from defendant its damages for said wrongful entry therein and for said injuries thereto in the sum of $400.00, together with its costs of suit herein laid out and expended, and that execution issue therefor.

151

And the court did further order, adjudge, and decree that the temporary injunction heretofore issued herein, enjoining and restraining defendant, its officers, agents, and employés, from further prosecuting or extending said tunnel, and from entering upon or within or underneath plaintiff's claim, and from further taking out, extracting, or removing ore by means of said tunnel or otherwise from within

the side and end lines of plaintiff's said claims extended downward vertically, be, and the same is hereby, made perpetual, and that defendant, its officers and employés, be, and they are hereby, forever enjoined from the renewal of each or any of said wrongful acts.

To which order and decree of the court and to each and every part thereof the defendant, by its counsel, then and there duly excepted.

Forasmuch as the matters aforesaid do not appear of record defendant prays that the same may be signed, sealed, and
152 made a part of the record in this cause, and it is accordingly so done this 2nd day of September, A. D. 1898.

HORACE G. LUNT, *Judge.* [SEAL.]

Approved:
J. C. HELM,
COLBURN & DUDLEY,
Attorneys for Plaintiff.

Approved:
W. E. SO RELLE,
Attorney for Defendant.

O K.
COLBURN & DUDLEY AND
J. C. HELM.

Tendered to me this 15th day of July, A. D. 1898.

HORACE G. LUNT, *Judge.*

I, Edgar Howbert, clerk of the district court of the fourth judicial district of the State of Colorado, do hereby certify the above and foregoing to be the original bill of exceptions filed in the case of The Ajax Gold Mining Company *vs.* The Calhoun Gold Mining Company on the 2nd day of September, A. D. 1898.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Colorado Springs, this 14th day of September, A. D. 1898.

EDGAR HOWBERT, *Clerk,*
By E. C. DAVIS, *Deputy.*

Revenue stamp.

Endorsed: 4870. Filed in the district court of El Paso county, Colorado, Sep. 2, 1898. Edgar Howbert, clerk, by E. C. Davis, deputy.

153 In the Supreme Court of the State of Colorado.

THE AJAX GOLD MINING COMPANY, a Corporation, Appellee,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Appellant.

Appeal from the District Court of El Paso County, Colorado.

Assignment of Errors.

Comes now the said appellant and shows unto the court that there was manifest error in the court below in this cause, and that the judgment of the court below should be reversed, and that judgment be entered in favor of appellant on account — the many and manifest errors apparent from the record herein, to wit:

1. The court erred in granting an injunction against the defendant, prohibiting defendant from prosecuting work in the Ithica tunnel or from extracting, removing, and selling ores from the veins intersected in said tunnel (folios 17–23).

2. The court erred in granting the injunction dated March 27, 1897 (fol. 18).

3. The court erred in denying defendant's petition to remove said cause to the circuit court of the United States within and for the district of Colorado (fol. 50).

4. The court erred in denying defendant's motion to dissolve the injunction issued against defendant March 27th, 1897 (fol. 148, 149).

5. The court erred in denying defendant's motion for leave to develop the veins described in the answer (fol. 153*a*).

154 6. The court erred in dissolving the injunction against the plaintiff (fol. 162).

7. The court erred in finding and entering final judgment in favor of the plaintiff or against the defendant for the reason that said judgment was not supported by the evidence and is contrary to law (fol. 170).

8. The court erred in said judgment in finding that the defendant is not entitled to a right of way through the Ithica tunnel through and across the Monarch, Mammoth Pearl, and Apex Lode mining claims (folio 170).

9. The court erred in said judgment in adjudging and decreeing that the plaintiff is the owner of and entitled to the sole, exclusive, peaceable, and undisturbed possession of the veins intersected in the Ithica tunnel, which said veins do not appear upon the surface and were not known to exist before the location of said tunnel (fol. 170).

10. The court erred in said judgment in adjudging and decreeing that the plaintiff is the owner and entitled to the sole and exclusive possession of the vein of the Victor Consolidated Lode mining claim within the side and end lines of the Apex, Monarch, and Mammoth Pearl Lode mining claims (folio 179).

11. The court erred in making the temporary injunction granted March 27th, 1897, against defendant perpetual and restraining defendant from further taking out the ores from the veins inter-

sected in said tunnel or from the Victor Consolidated vein, and also restraining defendant from exercising its right of way through plaintiff's claims in following said Victor Consolidated vein (fol. 181).

155 12. The court erred in said judgment in finding "that the matters and things stated in the complaint are true" (fol. 170).

13. The court erred in said judgment in finding that defendant constructed said tunnel without plaintiff's knowledge or consent (fol. 170).

14. The court erred in said judgment in finding that the veins, lodes, or ledges having their tops or apexes within the surface in conflict between the Victor Consolidated Lode claim of defendant and the Apex, Monarch, and Mammoth Pearl claims of the plaintiff were included in the grant and conveyed by the United States patents issued for the said Apex, Monarch, and Mammoth Pearl claim- (fol. 170).

15. The court erred in excluding the testimony offered by defendant tending to prove that no discovery of any vein, lode, ledge, or deposit bearing mineral in rock in place had been made within the Monarch or Mammoth Pearl Lode claims prior to the date of the location of the said Ithica Tunnel site (fol. 6, bill of exceptions).

To all of which errors the defendant then and there duly excepted.

Wherefore and for other good and sufficient reasons appearing in said record the appellant prays that the judgment herein be reversed, and that judgment be entered in favor of appellant or the cause remanded to the said district court of El Paso county for further proceedings herein.

W. E. SO RELLE,
Att'y for Appellant.

Endorsed: No. 3954. In supreme court, State of Colorado. The Calhoun Gold Mining Co., appellant, *vs.* The Ajax Gold Mining Co., appellee. Transcript of record, bill of exceptions, and assign-
156 ment of errors. Filed in supreme court this 14th day of Sept., 1898. Horace G. Clark, clerk.

In the Supreme Court of the State of Colorado, September Term, A. D. 1899.

THE CALHOUN GOLD MINING COMPANY, Appellant,
v.
THE AJAX GOLD MINING COMPANY, Appellee. } No. 3954.

District Court of El Paso County.

At this day, this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said district court in and for the county of El Paso as also upon the matters assigned for error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is no error in the proceedings

and judgment aforesaid of said district court, it is therefore considered and adjudged by the court that the judgment aforesaid of said district court be, and the same is hereby, affirmed and stand in full force and effect, and that this cause be remanded to said district court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said district court in the cause, notwithstanding the said appeal.

157 It is further considered and adjudged by the court that said appellee do have and recover of and from said appellant costs in this behalf expended, to be taxed, and that it have execution therefor; and let the opinion of the court filed herein be recorded.

I, Horace G. Clark, clerk of the supreme court of the State of Colorado, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 20th day of November, A. D. 1899, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, in the city of Denver, this 27th day of January, A. D. 1900.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK, *Clerk.*

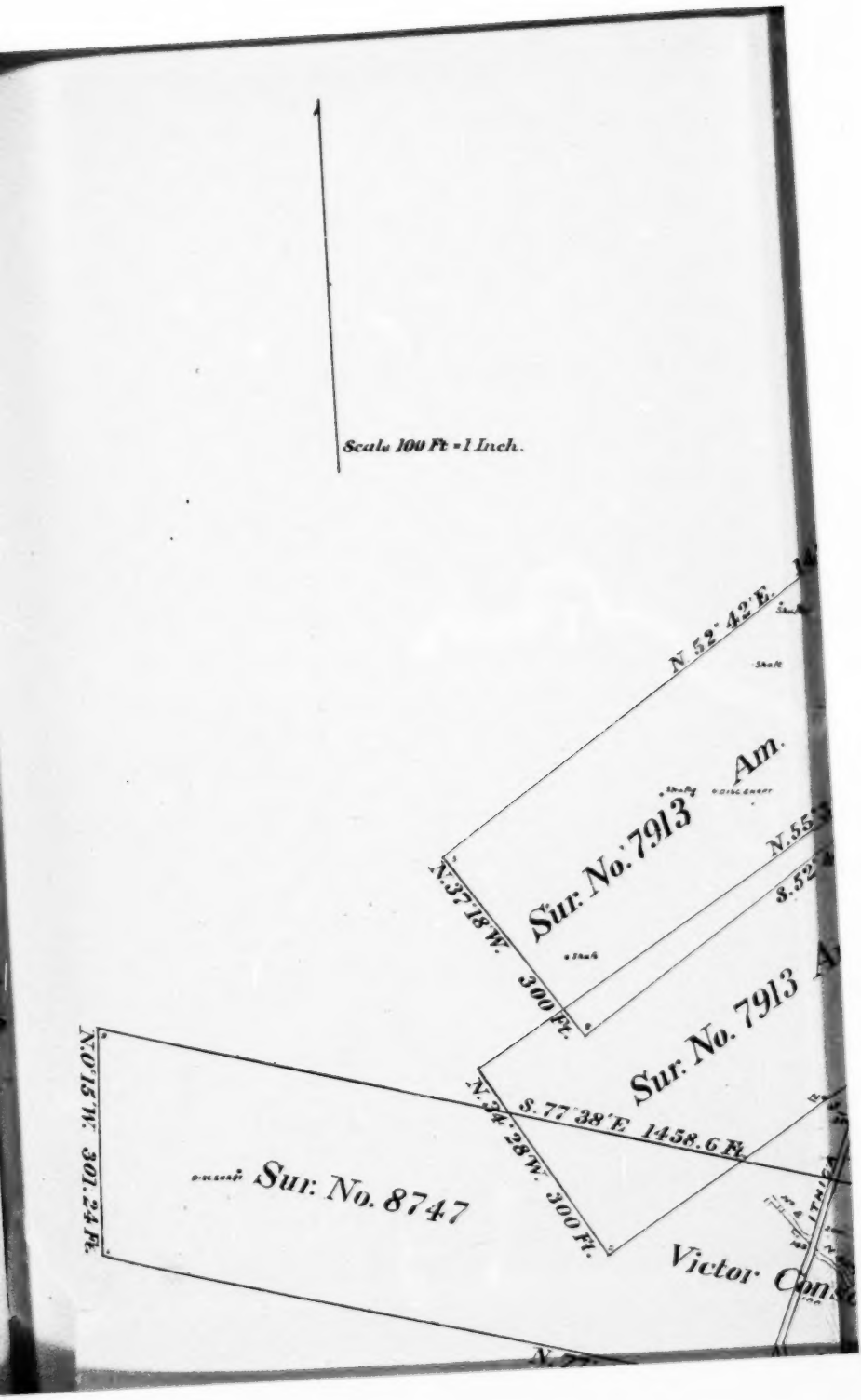
158 THE CALHOUN GOLD MINING COMPANY, Appellant,
v.
THE AJAX GOLD MINING COMPANY, Appellee. } No. 3954.

Appeal from the district court of El Paso county.

Mr. Justice GABBERT delivered the opinion of the court:

Appellee, the owner of the Monarch, Mammoth Pearl, Ajax, and Champion Lode mining claims, commenced this action in the court below to recover damages and restrain appellant, as defendant, from removing ore claimed to be within the boundaries of these claims and to which it asserted it was entitled by virtue of such ownership, and also to restrain defendant from prosecuting work upon a tunnel which the latter was excavating underneath such claims. Defendant answered, justifying its removal of ore and excavation of the tunnel upon two grounds: (1) That it was the owner of the Victor Consolidated claim, the vein of which crossed each of those embraced within the claims of plaintiff; (2) that it was the owner of the Ithica Tunnel site, projected across these claims, by virtue of which it was entitled to extend a tunnel underneath them; that in prosecuting work thereon it had penetrated the claims of plaintiff and discovered, located, and claimed numerous blind veins underneath the surface of such claims; that it had also cut the vein of its Victor Consolidated claim in this tunnel underneath the sur-

159 face of plaintiff's claims and removed ore therefrom of the value of four hundred dollars, and that it claimed to be entitled to excavate and run this tunnel for the purpose of discovering such blind veins, to work and remove ore therefrom and from its


Scale 100 Ft = 1 Inch.
N. 52° 42' E.
Sur. No. 7913 Am.
N. 37° 18' W. 300 Ft.
N. 55°
S. 52°
Sur. No. 7913 A
N. 34° 28' W. 300 Ft.
S. 77° 38' E. 1458.6 Ft.
N. 0° 15' W. 301.24 Ft.
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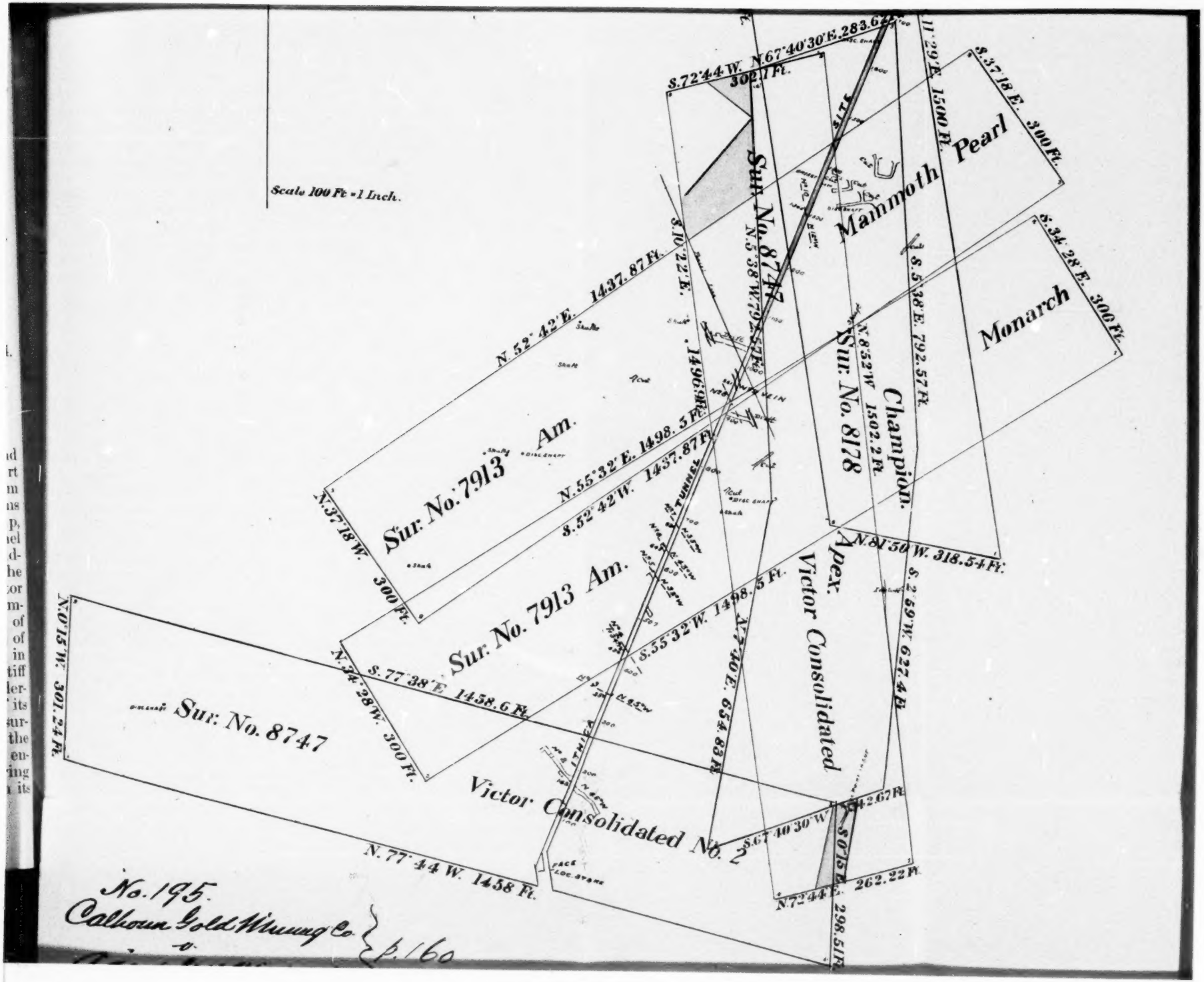

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Calhoun Gold Mining Co. } p. 160

Victor Consolidated vein. By stipulation the Champion was dropped from the case. Upon the issues made by the pleadings, the facts thereby admitted, a stipulation as to those controverted, and certain documentary evidence, the cause was tried to the court, which resulted in a judgment adjudging plaintiff to be the owner in fee of each of its lode claims in controversy in their entirety as patented, and, *inter alia*, with respect to veins, "together with all veins, lodes, or ledges having their tops or apexes therein, and including all that portion of the said Victor Consolidated vein within the side and end lines of the plaintiff's said claims, extended downwards vertically," for damages in the sum of four hundred dollars, and also enjoining defendant from prosecuting work upon or extending its tunnel underneath the claims of plaintiff, and with respect to removing ore, enjoined defendant (employing the language of the judgment) "from further taking out, extracting, or removing ore by means of said tunnel or otherwise from within the side and end lines of plaintiff's said claims, extended downward vertically." From this judgment the defendant brings the cause here on appeal.

The following reproduction of the plat which the parties stipulated below was correct, showing the relative location of the respective properties over which this controversy arises, will materially aid in understanding the questions involved.

(Here follows plat marked page 160.)

161 The controversy over the right of appellant to extend its Ithica tunnel is from the point where it enters the Monarch on the southerly side and from thence across the claims of plaintiff. The blind leads discovered are in that portion of the tunnel between the point where it enters plaintiff's claims on the south and the breast of its excavation. The vein of the Victor Consolidated is also cut in this tunnel at point marked 961. The conflict in the lode claims of the respective parties is included in the territory bounded by the south side line of the Monarch, the north side line of the Mammoth Pearl, and the side lines of the Victor Consolidated between these two lines. We are relieved from stating the pleadings to any considerable extent or determining the questions of law thereby presented, because on the trial below it was stipulated that the following are involved:

"First. Whether or not the Ithica tunnel, in such pleadings described, is entitled to a right of way through plaintiff's lode claims.

Second. Whether or not defendant has acquired by virtue of said tunnel and tunnel-site location the ownership and right to the possession of the blind veins cut therein, to wit, veins or lodes not appearing on the surface and not known to exist prior to the date of location of said tunnel site.

Third. Whether or not defendant is the owner and entitled to the ore contained in the vein of its Victor Consolidated claim within the surface boundaries and across plaintiff's lode claims.

Fourth. Whether or not the defendant may in this cause intro-

duce evidence for the purpose of showing that there was no
162 discovery of mineral in place on the Monarch and Mammoth Pearl claims of plaintiff prior to the location of said tunnel site."

From the pleadings, evidence, and stipulation of the parties, the facts established, so far as material to the controverted questions of law involved, are that each of appellee's claims was located prior to either the lode claim or tunnel site of appellant; that the receiver's receipt on each of the claims of appellee issued prior to the location of the tunnel site and prior to the issuance of receiver's receipt on the Victor Consolidated; that the patents upon the lode claims of appellee issued prior to the patent on the lode claim of appellant; that the patent to the Apex issued prior to the location of the tunnel site and on the Mammoth Pearl and Monarch subsequent to such location; that the vein of the Victor Consolidated was discovered and located from the surface, was not known to exist prior to such discovery, extends throughout the entire length of that claim, and on its strike crosses each of the veins in the claims of appellee upon which they were respectively discovered and located; that the tunnel cuts numerous blind veins underneath the surface of the claims of appellee, which do not appear upon the surface and were not known to exist prior to the location of the tunnel; that the vein of the Victor Consolidated was cut in this tunnel underneath the claims of appellee and ore of the value of four hundred dollars removed therefrom. It also appears that the patents upon the lode claims of appellee embrace the conflict with the Victor Consolidated without any reservation as to either surface or veins, and in this respect conform to the receiver's receipts upon such claims; that the patent on the Victor Consolidated
163 excludes the surface in conflict with the claims of appellee and all veins having their apex within such conflict, which are the same exceptions contained in the receiver's receipt for that claim; that the portal to the Ithica Tunnel site was at the date of its location on public domain; that work thereon was prosecuted diligently, and that the location of such tunnel was in all respects regular; that all necessary steps were taken by appellant to locate the blind veins cut in such tunnel, which are in controversy in this case; that the record titles of the claims of appellee are vested in it, and the record titles of the Victor Consolidated, the Ithica Tunnel site, and blind veins discovered therein underneath the claims of appellee are vested in appellant. The record discloses that appellant offered testimony tending to prove that at the date of the location of its tunnel site mineral in place had not been discovered on the Monarch and Mammoth Pearl Lode claims. The rights of the parties depend principally upon a construction of the following sections of the Revised Statutes of the United States:

"§ 2322. The locators of all mining claims heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United

States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations,
164 and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins, lodes, or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

"§ 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnels shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

165 "§ 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

The main questions presented for our determination, for convenience, we summarize as follows:

1. Is appellant the owner and entitled to the ore contained in the veins of the Victor Consolidated claim within the surface boundaries of appellee's lode claims?

2. Has appellant acquired, by virtue of its tunnel-site location, the ownership and right of possession to the blind veins cut therein underneath appellee's claims, and is its tunnel entitled to a right of way through the lode claims of appellee?

3. Should appellant have been permitted to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl claims of appellee prior to the location of the Ithica Tunnel site?

All these were answered in the negative by the court below.

The first question presented involves, particularly, a construction of § 2336 *supra*. The rights of a junior location to the ore of its vein embraced in the conflict with a senior have been determined by this court in Branagan *v.* Dulaney, 8 Colo., 408, and in several subsequent cases which have adopted the doctrine announced
166 in that case on this subject, and if we adhere to the law as announced in those cases, then the rights of appellant to the ore in the vein of the Victor Consolidated, included in the territory of that claim conflicting with that of appellee, are fixed and settled; for under these decisions it would be entitled to all this part of its vein except where it intersects the veins of appellee's claims. It is contended by counsel for appellee that the ruling in Branagan *v.* Dulaney and cases following it is wrong, and that this question should now be reconsidered. In opposition to a reconsideration of the rights of cross-lode claimants, as declared by those cases, it is urged that the doctrine of *stare decisis* applies, and even if wrong should not now be disturbed, because the rule therein announced has been established for such great length of time as to become a settled rule of property in this State. We are aware of the gravity of reversing a long-established precedent, and realize that it should not be disturbed except for the most cogent reasons; that the people of this Commonwealth have a right to presume that when a question has been once settled by this court that its decision is correct and that all may rely upon it. We understand, generally, that when a decision has established a settled rule of property upon which rights are predicated (and especially those relating to real estate) the law will be adhered to by the court announcing it, and those bound to follow its adjudications, even if erroneous—Black on Interpretation of Laws, § 152—but this rule is not inflexible. Courts are not bound to perpetuate errors merely upon the ground that a previous erroneous decision has been rendered on a given question. If it is wrong it should not be continued, unless it has been so long the rule
167 of action and relied upon to such an extent that greater injustice and injury will result by a reversal, though wrong, than to observe and follow it. Black on Interpretation of Laws, *supra;* Sutherland's Stat. Constr., § 316; Boon *v.* Bowers, 30 Miss., 246.

The law as announced in Branagan *v.* Dulaney has led to much confusion, and has been a fruitful source of litigation. Under it doubts have been cast upon titles to mining properties, and supposed rights reduced to uncertainties. Judging by the experience of the past, coupled with the knowledge of the present great activity in mining, to some extent caused, perhaps, by the marked improvements in mining and the reduction of ores, this industry is comparatively in its infancy in this State, and if the rule regarding cross-leads, as announced by this court, is wrong, it will result in more injury in the future to perpetuate it than will temporarily be caused by its reversal. It is a matter of common knowledge that ever since the decision of this court on that question its correctness has been doubted by many eminent members of the bar of this State familiar with mining law, and has even been the subject of expression to

that effect by this court—The Argonaut C. M. & M. Co. *v.* Turner, 23 Colo., 400—in which it was said, in speaking of the rights conveyed by patent to a mining claim, that it conveys all lodes or veins having their apexes within the boundaries of such claim, except, perhaps, cross-lodes. This doubt has been generally entertained by those engaged in mining, so that notwithstanding the length of time which has elapsed since the rendition of the first decision of this court on this question, it is safe to assume that it has not been implicitly relied upon as a sound exposition of the law relating
168 to cross-leads, and that in the great majority of instances parties have governed themselves accordingly.

The law construed in Branagan *v.* Dulaney is an act of Congress. The doctrine of *stare decisis* is based upon the assumption that the rules of law to which this doctrine applies have previously been determined by a court having final jurisdiction of the questions involved. For this reason, where the decision of a tribunal is subject to review by one having superior authority over it for that purpose, or the question determined may be passed upon by such tribunal in another case, the doctrine of *stare decisis* does not apply with full force until the same questions have been determined by the court of last resort. The construction of an act of Congress cannot be said to be authoritatively settled until passed upon by the highest court authorized so to do. This is the Supreme Court of the United States. It has never decided the question regarding cross-veins as presented in the case at bar. The decision of this court on that question may be reviewed by that tribunal; so that although this court has given the statutes affecting cross-lodes a construction which has since been followed in this State, nevertheless, as these same statutes are still open to construction by the highest tribunal of the land, their meaning on the subject of cross-leads as involved in this case has not been finally determined so as to become *stare decisis*. In Arizona, California, and Montana a different construction regarding the rights of cross-lode claimants has been given from that announced by the supreme court of this State. Watervale M. Co. *v.* Leach, 33 Pac., 418; Wilhelm *v.* Silvester, 101 Cal., 358; Pardee *v.* Murray, 4 Mon., 234.

169 Whether or not the reasons given for this conclusion are sound is not material. Sooner or later this question must be determined by the Supreme Court of the United States, and when it is, the law thus settled must be followed by all the courts of the States and Territories in which the act in question is in force. For these reasons we conclude that although this court has passed upon the identical question regarding cross-veins now involved, it is not precluded from again considering it, under the doctrine of *stare decisis*, or that the law as announced by this court in previous cases has become a settled rule of property in this State; and if, upon a reconsideration of such question, we conclude that our previous decisions thereon were wrong, we should not wait for a superior tribunal to so declare.

Before proceeding, however, with a discussion of this question we suggest that were it not for the expression in The Argonaut C. M. &

M. Co. *v.* Turner, *supra*, the action of the trial court in refusing to follow Branagan *v.* Dulaney would certainly be subject to criticism.

Previous to the act of 1872 relating to mining claims, which, with a few modifications, has been in force ever since its passage, the rights of a locator were practically limited to the vein upon which his location was made. That was the thing granted; the rights to surface ground only attached for the purpose of the convenient working of the vein so located; no rights to any other vein except the one upon which the location was made were given. Under the law then in force the surface ground, with the vein located, varied, controlled, as it was, in a great measure, by local rules or, in
170 their absence, by the judgment of the Land Department in each particular case, as to the area necessary for the convenient working of the mine; so that, as might be expected, the patents issued under the law prior to the act of 1872 embrace surface areas different and irregular in form. By this latter act a marked change was effected. The surface area which could be controlled by one location was definitely fixed, and this area being extensive it was necessary that rights therein should be definitely declared. The rights of the locator to the mineral which might exist underneath such surface area was no longer limited to the one vein upon which he made his location. By § 2322, *supra*, it is expressly provided that from and after the passage of the act of which it forms a part the locators of all mining claims theretofore or subsequently made, to which no adverse rights had attached on the tenth day of May, 1872, upon compliance with the laws and regulations governing their title, shall have the exclusive right of possession and enjoyment of the surface included within the lines of such locations and of all veins throughout their entire depth apexing inside of such surface lines extended downward vertically, although such veins might so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines. This section, standing alone, would seem to be clear, explicit, and unambiguous. It provides a test by which the right of a locator to a vein inside of the lines of his location extended downward vertically should be determined, namely, if the top or apex of a lode was within the boundaries of his claim, as above designated, then he should be the exclusive owner thereof, provided, of course, that no adverse rights thereto existed at the date of his location.

171 It is claimed by counsel for appellant that this section, by implication, excepts cross-veins, because no extralateral rights are given such veins, such rights being measured by the end lines of the claim extended in their own direction, and as cross-veins would not intersect these lines no extralateral rights would attach to such veins. That question is not involved in this case. Appellant is making no claim to any portion of the veins in controversy by reason of extralateral rights; and, besides, the vein of the Victor Consolidated is given no such rights, because by the judgment appellee is only declared to be the owner of that portion of the vein within the boundaries of its claims extended downward vertically. The most that can be said for this section on account of its phrase-

ology is that cross-veins are not given extralateral rights; and yet we can conceive of a location where a cross-vein upon its strike may cross the one upon which the location is made and intersect both end lines; but granting, for the sake of the argument, that veins crossing the one upon which the location is made have no extralateral rights (but upon that question we express no opinion), this would only operate as a limitation as to such rights, and not as to others which would attach by virtue of a location, for naming limits of a grant is not equivalent to saying that nothing is granted which does not extend to those limits. Del Monte M. Co. *v.* Last Chance M. Co., 171 U. S., 55. It is by virtue of § 2336, particularly, that counsel for appellant contend that the portion of the vein of the Victor Consolidated in controversy belongs to the latter, their position being that by this section cross-veins are excepted from the operation of § 2322. It is the section construed in Branagan
172 *v.* Dulaney. The rule adopted by the court in construing it in that case is an arbitrary one and never resorted to except in cases where the different sections of an act are in conflict, namely, "as between conflicting sections in the same statute, the last in order of arrangement will control," and applying this doctrine reached the conclusion that under § 2322 the locator of a claim acquired no rights to cross-veins apexing within the limits of his location.

The rule above announced is only applicable when there is an irreconcilable conflict between the different sections of the same act, and no reasonable construction will harmonize the parts; but as the two sections under consideration do not conflict in all their terms, the real question presented in construing them is, Does the latter qualify the former? It is presumed that each section is intended to coact with every other of the act of which it is a part, and that no one is intended to antagonize the general purpose of the enactment. Sutherland's Stat. Const., § 160. It is also a rule that in order to ascertain the legislative intent, every section of an act is to be construed; that it is to be construed as a whole—*supra;* Parkinson *v.* State, 74 Am. Dec., 522—and that construction which renders the whole act harmonious and gives effect to every clause and part is to be favored. 23 Enc. Law, 309; Brooks *v.* Mobile School Comms., 31 Ala., 227; People *v.* Burns, 5 Mich., 114; Patterson *v.* Spearman, 37 Iowa, 36.

In Branagan *v.* Dulaney it was assumed that the "space of intersection" meant the intersection of the veins of conflicting cross-locations, and as the mineral in this space was given to the prior location and none other, that, therefore, the junior locator of a cross-
173 lead had all the ore in his vein within the space of intersection of the conflicting locations save at the space where the veins intersected. § 2336 does not purport to provide for the location of cross-veins over territory included within a prior valid and subsisting location. Its purpose appears to be to fix the rights of the claimants of such veins to settle what might otherwise be conflicting rights between claimants of veins crossing or intersecting each other and provide easements for the benefit of the claimants of such veins—Wilhelm *v.* Silvester, *supra*—and unless in making such

provisions it impliedly gives the junior cross-claimant the ore of his vein, except at the point where it intersects the vein of a senior location, the doctrine announced in Branagan *v.* Dulaney cannot be upheld, so that in order to determine what rights are conferred upon a junior cross-claimant under this section the real question is, What is meant by the "space of intersection"?

The words employed in a statute are to be construed with reference to its subject-matter and the objects sought to be attained—23 Enc. Law, 322; Brewer's Lessee *v.* Blougher, 14 Peters, 178; Sedgwick's Stat. Constr., 359—as well as the legislative purpose in enacting it, and its language should receive that construction which will render it harmonious with that purpose rather than that which will defeat it. *Ibid.*, 319; Taylor *v.* Board of Comm., 67 Ind., 383; People *v.* Lacombe, 99 N. Y., 43. When ambiguous, its general intent as gathered from the statute furnishes a key by which its ambiguities may be solved and thus its words given that meaning which will harmonize with that intent. Sutherland's Stat. Constr., §§ 218, 219. Conditions with reference to the subject-matter
174 of the act, which it is apparent from its context it was necessary to provide for, may also be considered in ascertaining what is meant by that which is apparently ambiguous. People *v.* Lacombe, *supra.* It is evident from the provisions of § 2322 that the intent of Congress was to give to the locator of a claim to which no adverse rights had attached every vein apexing within the surface boundaries of his location unless its intent is negatived by § 2336. The words "intersect" and "cross" as used in this section are not strictly synonymous, and in using both it must be presumed intended to provide for different conditions. Veins might intersect, either on their strike or dip, and not cross; in that event it was necessary to provide which location should have the ore at the space of intersection, and it was declared that the prior location should have the ore within that space. In case they crossed, then a further provision was necessary, and it was provided that the junior location should have the right of way through the space of intersection for the convenient working of his mine. From a casual reading of this section it might be inferred that the "space of intersection" meant the intersection of the veins, but that does not necessarily follow, when its meaning, as ascertained by one or more of the canons of construction which may be invoked, is ambiguous, or different conditions exist which would control its import, or if by giving it that limitation the section in which it occurs conflicts with other portions of the act. Previous to May 10, 1872, as before noticed, no rights attached to any vein except the one upon which the location was made. All rights which had attached pre-
vious to that date were in no manner disturbed. § 2322, *supra,*
175 and 2344, *ibid.* In case of conflicting cross-locations made prior to that date each locator would hold the vein located upon up to the point where they intersected on their strike. It was necessary to settle which should have the ore within the space of intersection of such veins, and if they crossed what further rights the junior locator should have. This was done. In such case inter-

section would clearly mean the intersection of the veins. In case of locations made under the act of 1872 or prior to that date which were substantially parallel the respective veins in each might either intersect or cross upon their dip, in which event it would be necessary to provide which should be entitled to the ore within the space of vein intersection; and here, again, the meaning of "space of intersection," or the subject to which it refers, is the intersection of the veins. Again, under the conditions last noticed, the veins might unite, and to provide for this contingency it was declared that the prior location should take the vein below the point of union, including all the "space of intersection," which in that instance also refers to the intersection of the veins.

It may be urged that the construction thus far of this section is in conflict with § 2322 for the reason that under the latter the ownership of the space of intersection would depend upon which vein filled that space. Granted that this may be true, then we must invoke the rule that an act must be construed as a whole, and if the construction of § 2336 so far given modifies § 2322 it is not violating any rule applicable to the construction of different sections of the same act, which apparently conflict. This construction, however, does
176 not cause any conflict between the two sections. The former gives to the locator the veins to which his rights attach throughout their entire depth, and if upon their strike, limiting the latter to rights which vested prior to the tenth day of May, 1872, or in descending into the earth a body of ore bounded by the foot and hanging walls of his veins extended in their general course has been intruded from another source, or if in descending they unite with other veins, these are not reasons why he should not be the owner of such spaces of intersection or enlargements of his veins, caused by intersecting or uniting with others, but on the contrary, according to the terms of § 2322, he should be, provided, of course, that his title is prior to that of the location of the veins intersecting or uniting with his; so that the construction of these sections, under the conditions noted, render them harmonious, and § 2336 simply recognizes that in conflicts in such cases priority of title should govern—a test which is clearly in harmony with § 2322, and limits the provisions of § 2336 thus far to easements only.

It may also be said that an easement would exist in favor of a junior claimant to follow his vein through the space of intersection caused by veins crossing upon their dip, because by § 2322 the locator is entitled to follow a vein in its course into the earth outside the vertical side lines of his location. This may be true, but as to veins crossing on their strike no such right is impliedly given by that section, and, as we have endeavored to demonstrate, such a right was necessary under conditions above noted. In case of locations made subsequent to the act of 1872 which cross each other, or
177 those made under that act which likewise conflicted with locations made prior to the date it took effect, it was also necessary to provide for possible conditions, namely, the respective rights of the claimants of such locations, within the conflict of their claims, and particularly for a right of way for the junior claimant;

and the vital question now to determine is what is meant by the space of intersection in such cases as employed in § 2336, and which party would own the ore of the vein of the junior location within that space. We again reiterate that the clear intent of § 2322 was to give the locator of a claim to which no adverse rights were in existence at the date of his location all veins apexing within its surface boundaries. That eminent jurist, Mr. Justice Brewer, with his extended experience in mining litigation, certainly spoke advisedly, in Del Monte M. Co. *v.* Last Chance M. Co., *supra* (although the precise question now being considered was not there presented), when he said, in speaking of the rights of a locator under the provisions of this section: "Every vein whose apex is within the vertical limits of his surface lines passed to him by virtue of his location. He is not limited to only those which extend from one end line to another or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines." To the same effect is the language employed in 101 Cal., *supra*. By that section he has been given title to all such veins. Such being the case, was it intended by § 2336 to modify that grant or vest title in a cross-claimant to any part of a vein apexing within the boundaries of a prior valid location, and, especially, what rights were intended to be granted or fixed under the conditions now being considered?

178 It provides that in such cases priority of title shall be the test by which the ownership of the ore at the space of intersection shall be determined. That is in accord with the rights conferred by § 2322. So stating, however, is not equivalent to a grant. That language does not import that an exception is carved out of an estate which has already passed. Under the facts now in mind the senior locator, by virtue of § 2322, would own the ore of the junior cross-vein within the boundaries of his location, and before that right could be divested under § 2336 it must appear from the wording of the latter that such right is thereby expressly excepted. That the language of this section is not susceptible of the construction that creates such an exception it seems to us is clear, when we bear in mind that which we have already stated, that it does not pretend to deal with the location of cross-veins over senior valid locations, but the purpose of which was to provide for easements and settle rights which otherwise might be doubtful or the subject of controversy, without some further declarations than those contained in § 2322; and so we conclude that to render the two sections harmonious the space of intersection as used in § 2336, when applied to the facts now being considered, means the intersection of the claims. Barringer & Adams, 472, 473.

Under § 2322 no rights were given the owner of a location crossing a prior one to invade the latter for any purpose in following his vein upon its strike. This was an important matter. Without such right a portion of his claim might be rendered valueless, but if the expression "space of intersection" is limited to the intersec-

179 tion of veins as the space through which he should have a right of way for the convenient working of his mine it would

be of no avail, for he would have no right under which he could reach that easement; and so, again, in order to recognize one which would be of any value to the junior cross-claimant, the space of intersection must also mean the intersection of the claims. Morrison's Mining Rights, 9th ed., 115. The learned author of the work just cited, in treating the subject of title to ore included in the space of intersection as between conflicting cross-locations, under § 2336, gives the following cogent reasons why, in his opinion, as between such locations, the owner of the junior has a right of way through the senior, but no right to the ore of the claim which he crosses:

"It was within the power of Congress, by a subsequent clause, to have made the crossing lode an exception carved out of the general grant of the words of the previous section; but has it attempted so to do? The only grant of § 2336 is the right of way, which of itself implies that it is not a grant of the vein, but of an easement, to which the estate of the prior location is made servient."

"To give any part of the space of intersection to the holder of the later location would be to take from the older location something already granted to it. To create an exception out of his grant as he originally takes it, under act of Congress, would require in the wording of the act expressions as strong as are required to create an exception in a deed. An exception is equivalent to the reconveyance of land already conveyed. A right of way is not an exception, but a reservation, which may be inferred from any wording indicating an intention to create an easement. It takes nothing from the body of the grant of the first locator, but compels the first locator to use or hold his grant or claim subject to a right or privilege to the junior or overlapping claimant of reaching the other end of his claim by passage through the senior location."

Under the conclusion reached in Arizona, California, and Montana in the cases above cited, the ore within the space of overlapping claims would belong to the owner of the senior location. In the Arizona case that conclusion was reached upon the ground
180 that the expression "space of intersection" meant intersection of the veins; that they might so intersect upon either their strike or dip, but as to the former it was limited to locations made prior to the tenth day of May, 1872. The learned judge who wrote the opinion in that case appears to have given it careful consideration, but in seeking to harmonize the two sections, it seems to us, fell into the error of (1) holding that the space of intersection meant intersection of veins only; (2) imposed a limit upon the provisions of the section when he announced that it only applied to the intersection of veins upon their strike under locations made prior to May 10, 1872, which is not warranted, either expressly or by implication, and (3) by so doing necessarily deprived a junior location made under the act of 1872 of the right of way across a senior location if the former crossed the latter. In the California case the eminent jurist who wrote the opinion seems to have entertained similar views regarding the application of this section to rights which vested prior to May 10th, 1872, but, except as to those rights, inclined to the conclusion that this section only referred to the intersection of veins

upon their dip, which would also result in depriving a junior cross-claimant of a most important right. We think that Chief Justice Beatty, who concurred in the opinion in that case, more nearly announced the true doctrine when he said:

"I think, however, that too much is conceded, both in the opinion of the court and in the argument of counsel for respondent, in assuming that the provisions of § 2336 cannot be applied to locations made since the passage of the mining law of 1872 on veins
181 which intersect upon their strike without bringing it in conflict with the plain terms of § 2322. This wholly unwarranted assumption has been the source of all the trouble and difficulty which the land office and some of the State courts have encountered in their attempts to construe provisions of a statute which are in perfect harmony, but which have been erroneously supposed to be inconsistent."

The opinion in the Montana case is not altogether clear, but seems to limit the space of intersection as applied to the facts there presented to the intersection of the conflicting claims, but does not enter into a discussion of the subject, so that although we agree with the conclusion reached in each of those cases, we cannot accept the limitations imposed upon the provisions of this section or endorse the reasons advanced by the learned writers of the opinions in the Arizona and California cases.

Our conclusion is that the provisions of § 2336 apply to locations made under the act of 1872, as well as before, refer to the intersection or crossing of veins either upon their strike or dip; that the space of intersection in determining the ownership of ore within such space means either intersection of veins or conflicting claims, according to the facts in each particular case, and grants a right of way to the junior claimant for the convenient working of his mine through such space upon the veins (underneath the surface) which he owns or controls outside of that space. This construction renders the two sections entirely harmonious, gives effect to every clause and part of each, and in so far as § 2336 regulates or in any manner provides for rights as between conflicting claims, it applies only to intersections consistent with all the provisions of § 2322..

182 As we understand the rulings of the Land Department in issuing patent for conflicting mining claims, there is always excepted from the surface of the junior that portion conflicting with the senior, as well as all veins apexing within such conflict. This practice is in accord with our views, and although such a construction would not be controlling, the interpretation put upon the act by those whose duty it has been to construe, execute, and apply it is entitled to much weight. 23 Enc. Law, 339; Frost *v.* Pfeiffer, 26 Colo., ——; 58 Pac., 147; People *v.* Le Fevre, 21 Colo., 218.

The receiver's receipt, as well as the patent issued appellant, excepted therefrom all veins apexing within the conflict between its claim, the Victor Consolidated, and those of appellee. The patents to the latter granted all such veins, and thus all rights attaching by virtue of priority of location have been preserved to appellee. The location of the Victor Consolidated was junior to that of the claims

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of appellee, and from this fact and the views expressed it follows that appellant cannot complain of the judgment of the lower court in so far as it awards to appellee the vein of the Victor Consolidated and all veins apexing within the boundaries of the claims of the latter and awarded damages for the removal of ore. These views are in conflict with the case of Branagan *v.* Dulaney, and that case, as also those of this court following it, in so far as they conflict with the doctrine now announced regarding conflicting cross-claims, are overruled. The language of the judgment of the lower court regarding the rights of appellant in the conflicting territory is very explicit,
but only extends to acts of trespass, and does not prohibit those
183 which it may exercise therein by virtue of its ownership of the Victor Consolidated claim.

The determination of the second question presented involves a construction of § 2323, *supra*. The contention of counsel for appellant is that in all patents for lode claims blind leads are excepted and that the patentee takes no title thereto by virtue of patent. In answer to this, we have only to advance one step further in the construction of § 2322 and call attention to the fact that the test there applied by which the ownership of veins embraced in a valid, subsisting location is determined is that they apex within the boundaries of his claim extended downward vertically, without regard to where such apexes may be with reference to the surface, so that again the question presented is, does § 2323 conflict with or in any manner modify the provisions of § 2322, and in construing them the same rules must be observed relative to the construction of an act containing different sections that have already been invoked. The former provides what rights may be acquired to blind veins discovered in a tunnel run for the development of the vein or for the discovery of mines, but upon what ground may such tunnel be run or within what territory must the blind leads discovered therein be located in order to give the discoverer any rights thereto? A valid location of a mining claim, so long as it is in full force and effect, operates as a bar to a second of the premises so claimed. Belk *v.* Meagher, 104 U. S., 279; Gwillam *v.* Donnellan, 115 U. S., 45; Del Monte M. Co. *v.* Last Chance M. Co., 171 U. S., 55. The only exception is that a given location leaves open to others such rights therein as do not attach by virtue of such location; in other
words, that a location only carries with it such rights as it is
184 entitled to under the law by virtue of which it is made, and that rights not attaching are reserved to others. It is upon this ground that appellant contends that its rights to the blind leads in question attach—that is, that under § 2323 these veins are impliedly excepted from the locations and patents of appellee's claims. If such a conclusion can be deduced from the sections under consideration, they are hopelessly in conflict, for, first, there is granted all veins the ownership of which is determined in the manner we have designated, including blind, and then, immediately following, the grant to the latter is withdrawn. A location can take no rights which conflict with a prior valid one so long as it is kept alive. The law contemplates and the authorities recognize that the very

life of a mineral location depends upon the fact that it is made upon unappropriated mineral domain, and, with the one exception already noticed, this requirement extends to the entire location—that is, it cannot embrace any ground, nor can it initiate any rights, within the boundaries of a prior valid, subsisting location, except those reserved from the latter. This rule extends to all classes of mineral locations. In other words, priority determines the rights between conflicting locations. The tunnel of appellant was commenced upon ground open to location, but at the time it was located and work thereon commenced the ground embraced within the claims of appellee had already been located and claimed as lode claims, so that the rights of appellee to the ground within the boundaries of its claims and the leads in question had attached before appellant attempted to initiate any title thereto, and therefore none attached by virtue of the location of or work upon its
185 tunnel site, unless it appears that by virtue of § 2323 a tunnel for the discovery of blind leads may be projected across and extended into prior valid, subsisting locations, and title to the blind leads discovered within the boundaries of such claims thus be secured. It provides how inchoate rights to blind veins may be initiated; how they may become absolute; but nowhere does it in terms, either expressedly or impliedly, declare that for these purposes it may be projected into or across prior valid locations. To give it the interpretation that it does is to inject a meaning of which it is not susceptible, renders it irreconcilable with the provisions of the section preceding, and overthrows the doctrine of priority—the foundation upon which mining rights rest. It does not provide that under a location for tunnel-site purposes a right is granted to search for minerals in lands belonging to another, or that thereby a location for such purposes can be carved out of appropriated public domain, while limiting it to locations for tunnel-site purposes to ground not previously appropriated renders it harmonious with § 2322. That the latter was the clear meaning and intent of Congress in passing the act, of which these two sections form a part, is apparent from the further reading of § 2323, which in terms provides that locations on the line of the tunnel contemplated by this section of veins not appearing on the surface, made by others after the commencement of work thereon, and while it is being prosecuted with reasonable diligence, shall be invalid—a clear recognition of the controlling principle of priority. Counsel for appellant assert that the Enterprise M. Co. *v.* Rico-Aspen M. Co., 167 U. S., 108, and Ellet *v.* Campbell, 18 Colo., 510, affirmed in 167 U. S., 116, are authority for
186 their proposition that blind leads are excepted from all locations and patents; that no rights to such leads attach until discovered; that a tunnel site may be projected across and its tunnel extended underneath previous valid subsisting locations, and title to blind leads discovered in such tunnel within the boundaries of such claims not known to exist previous to the commencement of work thereon may be thus acquired by the owner of such tunnel. Neither of such cases so hold, and while they cannot be said to be directly in point, because the facts in the case at bar and those are

entirely different, yet by analogy the principle upon which the right to blind leads discovered and located under the section of the statute relative to tunnel sites which was applied in those cases is the same as that upon which we base our decision here, viz., priority of location; for in each of those cases the tunnel site was located prior to the date of the location of the lode claims within territory embraced within the tunnel-site location, and within the boundaries of which the blind leads were discovered and located, which were the subject of controversy. It was upon this ground, as we read and understand the opinions in these cases, in connection with the facts, that the inchoate rights of the tunnel claimants to such leads were predicated, and by virtue of which, when discovered on the line of the tunnel, they became absolute.

On the subject under considera-ion one further question needs to be determined, namely, Has appellant a right of way for its tunnel through the territory of appellee? It is contended by counsel for appellant that, under § 2338 Rev. Stat. U. S. and § 3141 Mills,
187 it is entitled to such rights. The first of these sections provides that in the absence of necessary legislation by Congress the legislature of a State may provide rules for working mines involving easements, drainage, and other necessary means to their complete development, and that these conditions shall be fully expressed in the patent. The section of Mills referred to provides that a tunnel claim located in accordance with its provisions shall have the right of way through lodes which may lie in its course, but it will be observed that this section only refers to tunnels located for the purpose of discovery, and if any of its provisions are still in force, which appears to be doubted in Ellet *v.* Campbell, *supra*, they can have no application to the case at bar, because the section of the Revised Statutes only provides for easements for the development of mines, and the section of Mills relied upon does not attempt to confer any such rights, but is limited to the one purpose of discovery. In this respect it has been clearly superseded by the act of Congress, so that if appellant is entitled to the right claimed it must attach by virtue of some provision of this act.

Mining rights are statutory, but not purely so. They relate to real estate, and such rights as are not defined or limited by statute are still controlled by the rules of the common law. Such rights as are conferred by a valid prior location, so long as it remains in full force and effect, are preserved from invasion and cannot be infringed upon or impaired by subsequent locations—Lindley on Mines, § 363—and are as fully protected under the rules of the common law as any
other classes of real estate. Under the statutes the subse-
188 quent locator has no right to penetrate a senior valid subsisting location underneath its surface boundaries extended downward vertically, except for the purposes specified in the mining law. We will not undertake to specify what these exceptions may be, but so far as they are not fixed by statute the possession and enjoyment of the ground underneath the surface of a valid subsisting location cannot be invaded. These exceptions do not include a

right to drive a tunnel through such a location for the purposes of discovery.

We are not aware that the precise questions presented for our determination, which we have designated as proposition second, in the former part of this opinion, have ever been passed upon by an appellate court. In the case of Strattan *v.* Gold Sovereign M. & T. Co., reported in 1 Mills' Legal Adviser, 350, in which case complainant brought an action to restrain defendants from extending a tunnel through the claim of the former, which had been located prior to the date of the tunnel site, the defendants answered that they were driving such tunnel for the avowed purpose of discovering and claiming blind veins within the territory of complainant's claims. Complainant applied to Judge Hallett for a temporary injunction, which he granted, and in the course of his opinion said:

"Chapter 6 of the Revised Statutes provides for three kinds of locations on the public mineral lands, which, in common speech, are called 'lode locations,' 'tunnel locations,' and 'placer locations.' When a location has been properly made in either class and so long as it shall be fully maintained by use and enjoyment or by patent, the territory embraced in such location is not subject to ad-
189 verse location by a claimant of the same class, or any other class. The reason is that the territory covered by such location has been severed from the public domain and has become private property, which is no longer open to a new appropriation."

Our construction of § 2323 is that a tunnel site can only embrace unappropriated public domain, and that under it no rights are conferred to extend a tunnel through previous valid, subsisting locations. From the record before us, appellant had no right to invade the premises of appellee, through its tunnel, and in the absence of any proof to the contrary the presumption attaches that all veins discovered in that part of its tunnel under appellee's claims belong to the latter—Wakeman *v.* Norton, 24 Colo., 192—and the judgment of the court that appellee was the owner of these veins and enjoining appellant from further extending its tunnel into or using that portion of it under the claims of appellee is correct.

The final question passed upon by the trial court, under the stipulation, relates to the offer of appellant to prove that at the time of the location of its Ithica Tunnel site no ore had been discovered in the Monarch and Mammoth Pearl. This offer was denied. At the time the tunnel site was located and work commenced thereon receiver's receipts had been obtained for these claims, upon which patents subsequently issued. These evidences of title took effect by relation as of date of the location of the respective claims. Lindley, § 783. As against a collateral attack, the action of the Land Department in issuing such patents conclusively settled that all steps necessary to constitute a valid location of these mining claims had
190 been taken, which included the discovery of mineral. This question has been so frequently decided that we do not deem it necessary to discuss it. Lindley, § 777; Davis, adm'r, *v.* Weibold, *supra;* Poire *v.* Wells, 6 Colo., 406; Justice M. Co. *v.* Lee, 21 Colo.,

260; Smelting Co. *v.* Kemp, 104 U. S., 636; Steele *v.* Smelting Co., 106 U. S., 447.

It is contended on behalf of appellant that this principle is not applicable as between tunnel-site and lode locations, because its rights were not involved in the patent proceedings. As to inchoate rights which attach to a tunnel location, this may be true, but it had none, unless it successfully attacked the title of appellee in apt time, for the location of appellee's claims was prior to the location of the tunnel site. At the time of that location receiver's receipt had issued upon the Mammouth Pearl and Monarch. We cannot understand how, upon any possible theory, the rule announced is not applicable, as between a tunnel-site location over a prior lode location, upon which a patent has already issued. So long as the title to the claims of appellee was only evidenced by receiver's receipt, it was still subject to an attack in a way; but when patent finally issued upon these claims, it conclusively settled, as against the junior location of appellant's tunnel site, that all steps necessary to constitute a valid location of appellee's claims had been taken.

Errors are assigned upon the action of the court below in denying appellant's petition to remove the cause to the circuit court of the United States for the district of Colorado. No argument is made upon this assignment, and we therefore decline to consider or pass upon it.

191 A further error assigned and argued by appellant is that the court erred in overruling its motion for leave to develop the blind veins in its tunnel within the lines of appellee's claims for the purpose of establishing their character. Its acts in attempting to initiate title to these veins was a trespass which it was not entitled to continue under any leave of court.

This disposes of all the questions argued, and, finding no error in the record, the judgment of the district court is affirmed.

Affirmed.

I, Horace G. Clark, clerk of the supreme court of the State of Colorado, do hereby certify that the foregoing is a true copy of an original opinion of the supreme court of the State of Colorado filed in the above-entitled cause on the 20th day of November, A. D. 1899, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, in the city of Denver, this 27th day of January, A. D. 1900.

[Seal Supreme Court, State of Colorado]

HORACE G. CLARK, *Clerk.*

192 In the Supreme Court of the State of Colorado.

THE CALHOUN GOLD MINING COMPANY, Appellant,
vs.
THE AJAX GOLD MINING COMPANY, Appellee. } Certificate.

To the honorable the judges of the Supreme Court of the United States, Greeting:

This is to certify that in the above-entitled cause judgment was rendered against the above-named appellant, The Calhoun Gold Mining Company, on the twentieth day of November, A. D. 1899, and in the hearing and determination of said cause there were involved several Federal questions, and that the said The Calhoun Gold Mining Company claimed the following title, right, privilege, and immunity under the statutes of the United States, and that said decision was against said title, right, privilege, and immunity specially set up and claimed by the said The Calhoun Gold Mining Company, to wit:

1. That said appellant claimed to be the owner of and entitled to the ores contained in the veins of its Victor Consolidated claim within the surface boundaries of appellee's lode claims, to wit, the Monarch, Mammoth Pearl, and Apex claims, under § 2336 of the Revised Statutes of the United States, and the decision was against such title and right claimed by the appellant.

2. That the appellant, by virtue of the Ithica Tunnel site location, and under § 2323 of the Revised Statutes of the United States, claimed the ownership and right of possession to the blind
193 veins cut in such tunnel underneath appellee's claims, to wit, the Monarch, Mammoth Pearl, and Apex claims, and the decision of the said supreme court of Colorado was against such right and title claimed by appellant.

3. That appellee, under said § 2323 of the Revised Statutes of the United States, claimed a right of way for its said tunnel through said lode claims of appellee, and the said decision was against such claim of right by the appellant.

4. That the said appellant, under the Revised Statutes of the United States, claimed the right and privilege to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the said Monarch and Mammoth Pearl claims of appellee prior to the location of the said Ithica Tunnel site of appellant, and that said right and privilege was denied the said appellant under the said decision of the said supreme court of Colorado.

Witness the Honorable John Campbell, chief justice of the supreme court of the State of Colorado, on this twenty-seventh day of January, in the year of our Lord nineteen hundred, and of the Independence of the United States the one hundred and twenty-fourth, at Denver, in the State of Colorado.

JOHN CAMPBELL,
Chief Justice of the Supreme Court of the State of Colorado.

194 *Certificate to Transcript of Record.*

UNITED STATES OF AMERICA, }
District of Colorado, State of Colorado, } ss:

I, Horace G. Clark, clerk of the supreme court of the State of Colorado, in the United States of America, do hereby certify that the foregoing pages, numbered in folios from 1 to 520, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Calhoun Gold Mining Company, appellant, *v.* The Ajax Gold Mining Company, appellee, No. 3954, as the same remain of record on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Denver, in the district and State of Colorado, this twenty-seventh day of January, in the year of our Lord nineteen hundred, and of the Independence of the United States the one hundred and twenty-fourth.

Seal Supreme Court, State of Colorado.

HORACE G. CLARK,
Clerk of the Supreme Court of the State of Colorado.

Endorsed on cover: File No., 17,628. Colorado supreme court. Term No., 195. The Calhoun Gold Mining Company, plaintiff in error, *vs.* The Ajax Gold Mining Company. Filed February 1st, 1900.